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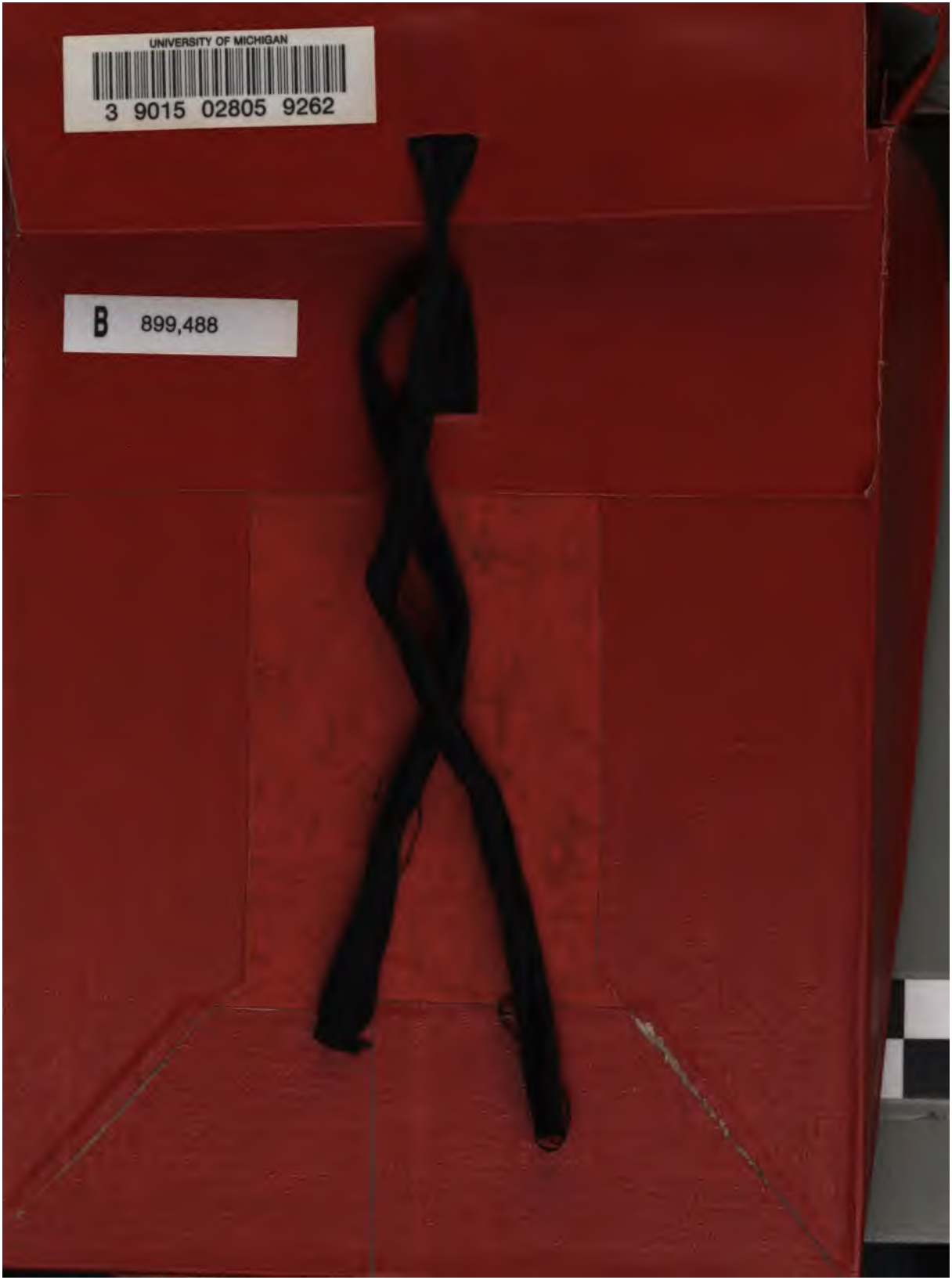

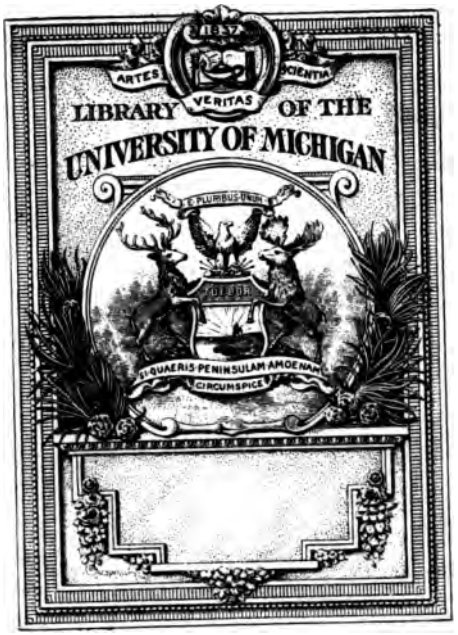

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THE

TRUE PRINCIPLES OF LEGISLATION

WITH REGARD TO

PROPERTY GIVEN FOR CHARITABLE OR OTHER PUBLIC USES.

(BEING AN ESSAY WHICH OBTAINED THE YORKE PRIZE OF THE UNIVERSITY OF CAMBRIDGE.)

By COURTNEY STANHOPE KENNY, LL.M.,

OF LINCOLN'S INN,

FELLOW AND LAW LECTURER OF DOWNING COLLEGE, CAMBRIDGE.

As the wisdom of man creates great institutions, so the folly of man destroys them.

—BURKE.

LONDON: REEVES AND TURNER, CHANCERY LANE.

1880.

PREFACE.

TWENTY years ago, Lord Campbell urged in Parliament the necessity of a "comprehensive reform of the Law of Mortmain, which is now in a most defective and lamentable condition. If not demolished, it ought to be reconstructed on a very different basis." The period which has since elapsed has brought this subject into the sphere of practical politics; and questions of Charity reform, whether partial or comprehensive, seem likely to occupy much of the attention of the Legislature for several years to come.

I venture to hope that the following pages will be of service, as well to politicians who may be called upon to take part in those reforms, as also to Charity Trustees who may wish to realise the full importance of the duties they are discharging, and even to benevolent persons who, in planning charitable gifts, may desire to enhance their liberality by a wise prescience. For even the philanthropist cannot escape the operation of those natural laws by which the well-being of society is regulated, but must submit to receive from economical science the lessons which it alone can teach.

My materials have chiefly been derived from the abundant stores of information which are accumulated in the Blue-books of the last sixty years. With their aid I have

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attempted to illustrate the broad theoretical generalities of my subject by the practical details of actual experience. I can claim no credit for novelty in either the data or the deductions of my book. In writing it, my utmost ambition has only been to bring into one focus evidence which previously lay scattered throughout a library, and to present in a compact body principles whose mutual bearing had not before been determined with precision.

Charitable Foundations, in the controversies of which they have now for more than a century been the theme, have suffered much from uncompromising opposition, and as much from indiscriminate defence. Both these extremes of opinion I have endeavoured to state accurately, but the conclusion to which my inquiries have led me is in harmony with neither. Endowed Charities, I believe it will be found, have done more good than harm. They should be protected and encouraged; but they should also be superintended and controlled.

Downing College.
May, 1880.

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The True Principles of Legislation

With regard to Property Given for Charitable or other Public Uses.

PART I.

INTRODUCTION.

Nil negat, et sese vel non poscentibus offert.
—*Claudian.*

AT the outset of our inquiry, the question naturally arises whether there is any reason why property devoted to public uses should be subject to any other rules of law than those which affect all other property.

"Charitable" uses, in the language of English law, are simply a class of public uses. To be public—that is, to benefit indefinite individuals—is essential to the legal idea of charity. A gift of a shilling to a poor neighbour, or of a hundred pounds to set up a grandchild in business, may be beneficent, and beneficent in the fuller sense of exceeding those reasonable expectations of his which it would be an act of mere justice to satisfy. In every ordinary sense it may be an act of 'charity.' But such gifts, or even a gift of money for such ten poor curates as the Bishop of London may select,* would not be called 'charitable' by English lawyers, since each recipient is an ascertained person, or readily can be rendered such.

Now as it is this characteristic of *Indefiniteness* that

* See *Thomas* v. *Howell* (L. R. 18 Eq. 198).

distinguishes public from private uses, it is upon it that whatever is necessarily peculiar and anomalous in the legal treatment of public gifts must depend. There is no definite person who can claim the due application of the gift. Then the law must supply peculiar and anomalous means for securing that due application. Some measure of supervision is needed in the case of property devoted to public uses, which is unnecessary for private property.

Gifts to public uses, again, are almost always characterised by a real or apparent *Meritoriousness*. Some rare instances may indeed be found—like gifts for diminishing the national debt, or for setting up a monument to the donor—in which the object is so futile or so personal that the gift will not inspire gratitude or admiration in even the most unreflecting observer. But in almost all cases a public gift has at least the semblance of a public benefit, and its donor is regarded by the majority of mankind with the reverence due to a 'pious founder.' This attribute of Meritoriousness, again, demands the attention of the jurist. The desire of public applause, the hope of divine favour, the impulse of benevolent zeal, may blind the Founder to primary but commonplace obligations. As there is this special hazard of his being generous before he is just, the law may have to supply peculiar and anomalous means for limiting his generosity. Some measure of restriction is needed—at any rate in certain stages of a nation's spiritual development—in the case of property devoted to perpetual public uses, which is unnecessary for private property.

But there is a third and still more remarkable attribute, which, though far from being an essential characteristic of gifts to public uses, is nevertheless attached to the great majority of them, and to all that are of any considerable value. It is that of *Perpetuity*. A charitable Foundation is usually intended to escape the fate of all other human institutions, and to continue its work of beneficence for ever. As no human being can foresee the results which his beneficent scheme will actually produce when tested by the unknown circumstances of centuries indefinitely remote, the

law must supply peculiar and anomalous means for securing the beneficence of those results by readjusting any errors which Time may disclose. Some measure of revision is needed in the case of property devoted to perpetual public uses which is unnecessary for private property.

Indefiniteness, Meritoriousness, Perpetuity—these, then, are the three peculiarities which make public endowments require a correspondingly peculiar treatment at the hands of the legislator. Supervision, Restriction, Revision—these are the precautions which the three respectively render necessary. To discuss in detail the reasons for taking each of these precautions, and the modes in which it may best be taken, must constitute the main purpose of this Essay. But before commencing such an attempt to determine the ideal form for a Jurisprudence of Mortmain, there is a preliminary question which existing controversies make it impossible to overlook. We have to ask whether the law is justified in permitting public gifts to be made at all.

The character of Perpetuity, though neither essential nor peculiar to public gifts, is nevertheless the most salient and the most important of their ordinary attributes. It is the source of the great paradox which lies at the root of the theory of charitable Foundations — a paradox so strange that centuries of painful experience have been necessary to enable statesmen and philanthropists to realise its truth. That paradox is this: that whilst charity tends to do good, perpetual Charities tend to do evil. Too often, misdirected by their Founder or misconducted by their administrators, they bless neither him that gives nor him that takes.

All men are agreed in speaking reverently of the Good Samaritan. No one proposes to indict the Founders of Hospital Sunday for a conspiracy. Yet competent observers are agreed in regarding the Founders of some of the most important Charities of Europe as men who have inflicted grave physical and moral evil upon their race; and some great publicists, eminent for philanthropy, have desired the legal prohibition of all philanthropic Foundations. This apparent contradiction must be explained at the outset of our inquiry.

PART II.

SHOULD CHARITABLE ENDOWMENTS BE PROHIBITED?

He left to meaner minds the simple deed
By which the houseless rest, the hungry feed;
His was a public bounty, vast and grand,
'Twas not in him to work with viewless hand.
—*Crabbe.*

Active benevolence is recognised by all monotheistic religions as the highest attribute of the Deity—by all schools of ethics as the fairest virtue of man. It is the standard by which we gauge the worth of individuals, of nations, of ages, of creeds. Above the fair inhumanities of old religion we rank the charities of Christianity, even when dispensed by the dullest monk or the fiercest sectary. Above the temples of Athens and the palaces of Rome, we set the schools, the almshouses, and the hospitals with which the vulgar burgomasters of Amsterdam and the plain citizens of London have studded their streets. The Monthyon prizes recognise a nobler greatness than the Olympic wreaths. The life of Elizabeth Fry awakens keener interest than that of Catherine or of Hypatia; and Howard's circumnavigation of charity excites a deeper thrill than Alexander's march for universal conquest.

Charity's scope is world-wide. Clarkson in a study at Cambridge pledged himself to the service of the black men of Africa; Carey in his cobbler's stall resolved to spend his life for the pagan millions of Hindostan. Howard, as Darwin paints him, wandered

"From realm to realm, with cross or crescent crowned,
Where'er mankind and misery were found."

The true lover of his race—

"Driven by strong benevolence of soul,
Will fly, like Oglethorpe, from pole to pole."

Now a perfect philanthropy — "the love which scarce collective Man can fill" — must disregard the limits of

time as utterly as those of space. The ardour of that sympathy, which can thus overlook all differences of colour, creed, and climate in its zeal, will assuredly not consent to be balked by intervals of time. The benevolence which thinks of the Antipodes will not forget the posterity of its own townsfolk. Moreover, whilst the latter duty is at least equally attractive, it has the advantage of being far more facile. To do good in a distant continent is only possible to great wisdom or great wealth; but so long as land pays rent or capital bears interest, the humblest gift may be so bestowed as to do good in distant centuries.

If, then, the philanthropist who devotes his span of life to human weal thus arouses our veneration and love, many of us will infer that still greater homage must await the still greater benefactor whose good deeds are so framed as to endure beyond his life, and perpetuate his liberality throughout all time. We shall be prepared to find endowed charities ranked by common consent amongst the noblest of human works, the praise of Founders the theme of the historian's most glowing pages, and the preservation and extension of these monuments of far-seeing piety the sedulous object of the jurist and the politician.

Such an expectation, common as it may once have been, forgets that human benevolence is far greater than human wisdom. The Creator of man, in ordaining that his happiness should depend far more on his virtue than on his intelligence, mercifully placed it in his power to rise almost to the verge of his ideal of benevolence, whilst forbidding him even a distant approach to his ideal of wisdom.

In such lives as those of Cakya-mouni, of St. Paul, of St. Francis, of Fenelon, of Ken, of Channing, of Comte, the love of mankind may seem sublimated to a purity which—in the imperfect records that alone are open to human eyes—is undistinguishable from perfect altruism. But to none of them, nay nor to Aristotle, to Aquinas, to Bacon, to Goethe, nor to Burke, could we turn with confidence for enduring counsels to direct this benevolence, or for an intellectual theory of the methods of philanthropy, which should hold

true through the chances and changes of even a single century.

Hence it has too often come to pass that the scheme of benevolence whose far-reaching views and undying ambition seemed to commend it above all others to the awe and gratitude of mankind, has proved the most futile and most fruitless. "The perennial existence of bodies corporate," said Burke, "is a thing particularly suited to a man who has long views, who meditates designs that require time in fashioning, and propose duration when they are accomplished." Alas! that immortal existence is too often only the immortality of a Struldbrug — a perennial senility, a deathless dotage.

Such a piece of work is man, so complex in needs and so mutable in circumstance, that the keenest eye cannot foresee for a generation either his surroundings or his wants. Some kindly heart that has throbbed through a lifetime of generous impulses, attempts to prolong its beneficence beyond the tomb, and to continue its charities after itself has ceased to beat. Too often the result will serve only to show that it mistook the problems it was encountering; and that the insight which directed it fairly accurately in dispensing kindness among chosen individuals in a well-known circle, could afford no trustworthy guidance for its course amongst the unknown multitudes of unknown times. For general benevolence it is as true as for personal enjoyment, that "the present hour alone is man's."

But even if by happy accident the guess proves right, and the permanent supply turns out to have been addressed to a permanent need, there is still another peril to be feared, and this a yet more probable one. The hands that ought to administer the supply may prove weak or treacherous. The Founder's zeal cannot be devised with his lands; his energy cannot be placed in mortmain along with his Foundation.

From these two causes—the fallible judgment of their creators, and the ill conduct of their administrators—causes so frequent as to seem at times universal, the endowments

of all countries have presented such a history of misuse, disuse, and abuse, as has often provoked a revolution in the estimate in which they were held by thoughtful men. Never elsewhere has that history been so tersely and brilliantly summed up as in an essay which Turgot contributed to the *Encyclopédie*,* and which, after the lapse of more than a century, remains still the masterpiece of this great controversy.

The purpose which Turgot had in view was no less than "to create a distaste for new Foundations, and to destroy any lingering superstitious regard for the old ones." Let us retrace the line of arguments which he elaborated, and see if our modern experience does not even add to their weight.

I. He begins by a description of the grave intellectual difficulties, the abstruse social problems, which must be weighed and solved by a man who aspires to be a Founder. Granting him to be a single-minded philanthropist, with no aim in view but the benefit of his fellows, that aim is no easy one to effect *in perpetuity*, and "un fondateur est un homme qui veut *éterniser* l'effet de ses volontés." At the very outset, simply to set his charitable work afloat, he must determine the best form for his Foundation to assume; and to determine this involves the consideration of three problems, each of them grave.

(*a*) Granting that he has already chosen a field for his benevolence, and fixed upon the particular social evil which he seeks to assuage, he must still set to work to determine the true character of this evil, to diagnose the malady, and penetrate beneath appearances to its real essence. This is a task whose complexity the most profound thinker realises the most vividly. But until it is accomplished, there is every probability that the empirical philanthropist will confuse effects with causes, mistake the symptom for the disease, and end, like an unskilful physician, by removing the sore from the skin, but driving the poisonous juices nearer to the heart. It is better to bequeath money to drain the fens, than to found a hospital for malaria.

* Art., *Fondation*.

(*b*) When the root of the evil is detected, it still remains to discover the remedy. This task is yet harder than the previous one. The remedy that seems most promising, may in reality be utterly impotent. Many founders have endeavoured to stimulate devotion by providing money or bread to be distributed as rewards for attending church, or participating in the Eucharist; but it may be doubted whether, in congregations gathered by the prospect of loaves and fishes, the glow of pure devotion was ever felt. Many founders have endeavoured to extend the bounds of human knowledge by providing collegiate fellowships free from all obligations but that of study; but it may be doubted whether endowment has done anything to stimulate research. Many a kindly man of forty years ago spent in buying bread for his poor neighbours, the guinea that would better have been given to the Anti-Corn Law League.

Recent instances may serve to shew how utterly a Founder may mistake his own capacity, and may defeat an admirable purpose by planning an absurd scheme for carrying it out. Admiral B. M. Kelly in 1867 left £90,000 to found a school for sons of officers in the Navy. The lads were to have a first-class education up to the age of eighteen. But the head master's salary was only to amount to "the value of 100 bushels of wheat," which, as the Charity Commissioners say, was "ludicrously inadequate." Many further difficulties arose "from the minuteness with which the testator, who was a sailor, and evidently knew little about schools, had given directions."* Similarly Dr. Swiney left an endowment for a prize essay in Jurisprudence, but ordered that the adjudicators should include all the members of the Society of Arts and their wives, and the members of the College of Physicians, and their wives; the whole body of adjudicators to meet and to award the prize by show of hands! The will is still in force, but a kind of private arrangement has been made which establishes a different tribunal.† So, again, in New York there exists a very

* Parl. Papers, 1870, xvii., p. 36.

† Journal of the Society of Arts, xvii., 693.

wealthy endowment, with a very highly paid governor, for disabled seamen; but it is saddled with regulations so distasteful to disabled seamen, that hardly any will consent to receive its assistance. The wealth goes on increasing, whilst the number of beneficiaries decreases.*

Nor is the risk of impotence the worst peril. The proposed remedy may intensify the evil which it seeks to cure. The hand of Charity has too often worn a poisoned glove. Past centuries have seen a population of paupers created by monasteries that were founded to remove poverty. Our own century has seen philanthropists attempting to eradicate crime by Reformatories that made a criminal conviction the essential qualification for admission; and attempting to promote female virtue by Refuges which would shelter no one till she had ceased to be virtuous. St. Bartholomew's Hospital† enjoys an estate in Essex which was devised to it to discharge the expense of providing dinners of veal for those convalescent patients who have been upon a milk diet; but the Governors of the present day humanely misappropriate their trust, and decline to undo the cures that their surgeons have effected. A Herefordshire man once declared that the greatest benefactor to Herefordshire would be the man who should cut down all its apple trees, and carry away all its endowments; for the former brutalised the population, and the latter pauperised them.‡

A third case is possible. The suggested remedy may bring about a new evil worse than the one it cures. Foundling Hospitals, erected to preserve infant life, have demoralised whole cities by removing the first penalty of unchastity; (whilst, at the same time, by separating from maternal care the wretched offspring which themselves have thus called into existence, they produce an involuntary infanticide, less guilty but far more extensive than that which they seek to prevent). Lying-in Hospitals, if we

* Transactions of Social Science Association, 1869, p. 147.

† This fact I owe to information received from one of the Governors.

‡ Report of Popular Education Commission (8vo. edition), I., 461.

may trust a recent school of medical statisticians, have diminished the discomforts of maternity only at the cost of multiplying its perils by all the hideous hazards of puerperal fever.*

(*c*) But let us suppose that both the bane and the antidote have been discovered. The Founder has succeeded not only in detecting the true character and causes of the evil which he seeks to eradicate, but also in determining the aptest and most potent remedy. It still remains for him to devise means by which he can secure the effective and permanent application of this remedy through that long range of time for which his Foundation is to endure. He must foresee the opportunities of fraud and the facilities for neglect, and must provide for each of them. Stimulus, check, safeguard, corrective—all are to be planned. He cannot bequeath his zeal along with his wealth.†

Even the benevolence of an individual flags as years roll on. The glow of early enthusiasm may at last grow as cold in the philanthropist as it does in the lover. As the patriot may sink into a placeman, or the saint into a sinecurist, so the philanthropist is apt to find himself lose all the inspiration of his days of charity amidst the personal cares or desires which every year multiplies. But if this is true of each individual, how small is the chance of maintaining lifelong enthusiasm throughout an entire group? Suppose the extreme instance of a corporation all whose members, or a society all whose servants, commenced their labours at the outset with single-minded zeal; it would still be impossible to maintain in permanence this universal glow. What are we to anticipate in a succeeding generation, when, perhaps, not a single one of the successors has felt this zeal even at the commencement of his service? If the duty is a gra-

* "The risks of contamination of the air, and of the impregnation of the materials of the building with morbid substances, are so greatly increased that the greatest care is necessary that hospitals should not become pesthouses, and do more harm than good." (Sir James Simpson, *Works* II. 405.) According to the statistics which Simpson cites (II. 345) from Lefort, the mortality of women delivered in hospitals exceeds that of women delivered at their homes in the ratio of 212 to 29.

† Cf. Mr. Herbert Spencer's *Study of Sociology*, pp. 343—346.

tuitous one, it will fall into oblivion—as the duties of almost all the Visitors of charities have done. If it is rewarded by a stipend, the stipend will be a source of corruption—as the stipends of almost all the Masterships of almshouses once became. Turgot suggests—and the rise of the successive monastic orders affords striking illustrations of the suggestion—that the very multiplicity of charitable Foundations is but a proof of their liability to abuse; new Foundations having often been established simply because the old had grown so degenerate that it was easier to create than to correct.

It is not necessary to take instances of inhumanity; like Turgot's hospitals, where the attendants had grown callous to the sufferings which surrounded them, and "on a vu le même lit être à la fois le lit de la mort et le lit de la débauche." It is not even necessary to rely on instances of dishonesty, or even of indolence. It is sufficient to remember other hospitals, nearer home, where governors, humane, honest, and energetic, have squandered their resources upon palatial buildings and regal banquets; and have proudly pointed to their wastefulness as a proof of their loyalty to the Foundation and their respect for the Founder. "We are taught," says Mr. Hare, "by the universal history of Endowments that their administration has never corresponded with the original design."* No Founder has yet succeeded in devising a scheme which would, from within, secure the purity of its own working; so fatal and so inevitable is the operation of (to borrow Mr. Lowe's apt phrase) 'the Principle of Caducity.'

What does actual experience show? Let us take the case of educational endowments. This may be regarded as the most favourable instance, both because the object is the most unexceptionable, and because each pupil has parents or guardians whose interest in his education renders them so many checks upon the operation of the deadly 'principle of caducity.' But even here there is authoritative evidence of the unsatisfactory result of Endowment.

* Transactions of Social Science Association, 1869, p. 133.

Upon the endowed *primary* schools, the Duke of Newcastle's Commission on Popular Education reported in 1860, that "A large proportion of them are not turned to good account at present. . . It is not so much positive abuse that *now* calls for a remedy, as inefficiency, languor, and inadequacy of the results to the pecuniary means of the foundations. That in these respects remedial measures are needed, all the evidence before us on the subject conspires to show."* And, again, "Our general evidence as to the present state of these endowments and their present influence on education, we find almost without exception unfavourable, and decidedly pointing to the necessity of remedial measures."† That evidence included testimony from the Dean of Carlisle‡ that "Endowments in connection with the schools of the working classes are, generally speaking, unmitigated evils. . . . In most cases the evils of endowments are so great that parishes would be far better without any such schools at all." It included testimony from the Assistant Commissioner for a London District,§ who reported, "I have found a general dulness and want of life to be the general characteristics of endowed [primary] schools." It included the testimony of an Inspector of Charities, || who reported that "In general, unendowed schools are better administered than others. The interest of the master is too often more thought of than that of the scholars." It included the testimony of Bishop Villiers, who said, "I believe I state a fact which admits of no controversy, that, as a whole, schools with small endowments are worse than any others."¶

Again, upon the endowed *secondary* schools, the Schools' Inquiry Commission reported in 1868,** that "It is clear, from the information which we have ourselves received, that there are few endowments applicable to secondary education which are put to the best use, and very many which are working to little or to bad use." And again, "We have

* Report, 8vo. edition, I., 460.
† I., 467.
‡ I., 467.
§ I., 461.
|| VI., 505.
¶ I. 467.
** I., 103.

pointed out many important endowments where very large funds are producing at present little or even no result."* Thus Thame Grammar School had two masters and one boy;† whilst those at Sutton Coldfield (endowed with £467 a year), Mancetter (£288 a year), and Little Walsingham (£110 a year) were sometimes without any boys at all.‡ Whilst the evidence of their Assistant Commissioners included such testimony as the following:—"At Bath an income of £461 appears to hinder rather than promote the education of the citizens, and does nothing for the neighbourhood."§ "The fine Foundation at Market Bosworth, now £792 a year, is reported to be at present useless."‖ "Gloucestershire and Herefordshire require special notice for the generally unsatisfactory condition of their endowed schools. Gloucestershire has seventeen Foundations for secondary education, and none of these are reported to be at all efficient."¶ "It is difficult to understand that Masham school serves any useful purpose." "A school of this kind (Easingwold) does great harm to the community." "This school (Bridlington) in its present state hinders rather than promotes the civilisation of the place." "Much of the vitality of Doncaster school is owing to the fact that it possesses none of the wealth which in so many instances proves to be an encouragement to indolence."** On the other hand, they report†† that "Liverpool is remarkable alike for its entire absence of ancient endowments for secondary education, and for the efforts of its inhabitants to provide such education." And the Scotch Education Commissioners tell us that whilst "the most notable feature of the [Scotch] schools is the want of endowments,"‡‡ yet "the Burgh and other secondary schools of Scotland are in a satisfactory condition and superior to the majority of the English grammar schools."§§ "In Scotland this class of schools are scarcely endowed at

* Report, 8vo. edition, I., 435. † I., 262.
‡ Cf. Report of Popular Education Commission, I., 486.
§ Report of Schools Inquiry Commission, I., 368. ‖ I., 377.
¶ I., 386. ** I., 401. †† I., 345.
‡‡ Third Report, Parl. Papers, 1867-8, xxix., p. xvii.
§§ P. xi.

all. In England the cost is borne by the endowment."* The endowments of the Scotch secondary schools seem only to constitute about one-seventeenth of their incomes.

Or shall we turn from educational to ecclesiastical endowments, in the hope that at least in the sense of religious obligation there will be found an influence capable of counteracting the Principle of Caducity. Here, again, the result of endowments has so often been to paralyse the efforts which they were intended to promote, that the school of politicians at whose head Hume stands, have advocated the endowment of the Christian Church as the surest means of benumbing her. Where, indeed, the close connexion of State and Church by a national establishment of religion has secured to the former a constant right of control over the endowments of the Church, it is possible to retain the important aid of these endowments, and yet counteract their fatal tendencies. The parliamentary readjustment of the revenues of the Established Church laid the material basis of that spiritual progress which renders her position in 1879 so vivid a contrast to that which she held fifty years before.

But in unestablished Churches, upon whom no amending hand can ever be laid from outside, the fatal influence of endowments is without a check, and will run its course to the hazard of religion—sapping the life of these Churches if they be weak, or, if they be strong, aggrandising them until they imperil the life of the State itself. The latter result will probably be witnessed in America by our children, unless the Western States contrive by rigid Mortmain laws to check the growing wealth of the Roman Church. Instances of the former result may be traced in the history of our own country during the last and the present century.† In the eighteenth century, when Parliament left the Established Church to the unchecked influence of her endowments, the consequence was that the number of Nonconformists increased in the hundred years from one-twenty-second of the total number of Churchmen to no less than one-eighth;

* Third Report, Parl. Papers, 1867-8, xxix., p. xvi.

† See Dr. Stoughton's *Religion in England, II.*, 377, following Williams' *Church of the Restoration, II.*, 207.

though in the present generation the rate of increase amongst Churchmen is at least as rapid as amongst Nonconformists. Again, at the beginning of the present century all the other sections of Dissenters were estimated as being together only seven times as numerous as that section called indiscriminately "Presbyterian" or "Unitarian"—whose chapels, unlike those of other Nonconformists in general, frequently had endowments attached to them.* It is a significant fact, that whilst that section still retains at least its old proportion of the Dissenters of the wealthy or the professional classes, yet its general advance has been so rapidly outstripped by that of the unendowed Dissenting bodies, that they now possess at least forty times its number of adherents. (It may, indeed, be said, and with justice, that this slow development is largely due to the fact that the "Presbyterian" minister of the last century was seldom under the control of the general body of his hearers, or his communicants, but only of a small knot of Trustees. But then, it must be remembered that only the existence of endowments made it possible to keep up so oligarchical a form of government.)

The attitude of English Nonconformists towards endowments may be gathered from the following summary of their experience of them:—

"By the bequests of pious individuals, benefactions were from time to time made to some congregations for the more comfortable support of the minister. Where they did not amount to a sum large enough of itself for a salary, it was of service, especially in small societies where the people were unable to raise a sufficiency among themselves. But wherever the benefaction was large enough for the minister's support, it has been found with but few exceptions to be

* In 1830 it was calculated that of the total amount received in stipends by the Unitarian ministers, one-half was derived from permanent endowments. (T. S. James' *Presbyterian Chapels*, p. 574.) Even a century earlier, the Presbyterian endowments were usually of larger amount than those of the Independents. (Halley's *Lancashire Puritanism*, II. 382.) During the eighteenth century the Presbyterian section sank from being two-thirds of the whole body of Dissenters to be only the above-mentioned one-eighth of them. (Bogue and Bennett, 2nd ed., II. 545; T. S. James, p. 10.)

detrimental to the cause which it was designed to cherish. When the people are considered as cyphers, they act as cyphers; they appear to feel but little concern for the welfare of the society, and have not displayed the same zealous activity and lively interest as when everything depended on themselves. So uniform has been the operation of this cause, that where ministers possessed of opulence would receive nothing from their hearers as a reward for their labours, it is but seldom that such congregations have been in a flourishing state. A listlessness and want of public spirit have pervaded the whole mass; so dangerous is it to exclude Christians from the performance of a duty."

"The benefactions have proved injurious in another way. When such a fund has fallen into the possession of an unsuitable minister, who by his sloth, pride, or error, has rendered himself disagreeable to his congregation, they have no means of procuring his removal, and he continues performing his stated services, while the cause of religion is decaying, and his audience dwindling away before his eyes. Whereas, had the minister's support been derived from the people, necessity would soon have compelled him to depart and make room for another much better than himself."*

II. The triple problem thus described will tax all the resources of a trained intellect. To solve it successfully demands the highest political wisdom. But mental and moral greatness are too seldom found combined in one man for us to expect that many founders will be qualified for the task which their benevolence has led them to attempt.

Let us, however, suppose that we find a man whose head is worthy of his heart, and who is competent to contrive and plan all that his philanthropy may suggest. Is it certain, even then, that his benevolence and intellect will be permitted to accomplish all that they have the power to effect? Are there no hostile influences which may bias the judgment and impair the triumph? Alas, there are—influences so common that scarcely any heart is exempt from them—so plausible that scarcely any conscience is alive to them. The

* Bogue and Bennett's *History of the Dissenters*, iii., 348.

love of applause, the hope of fame, the pride of family, the caprices of association, may dictate many a modification or condition that will mar the wisdom of his designs, or may suggest some new project that will supersede them altogether. A lady is buried in St. Bartholomew's churchyard, West Smithfield, who left a fund to be distributed amongst aged women every Good Friday; but she added the puerile and cruel requirement that these infirm crones should pick up their sixpences from the surface of her grave.

III. Wisely to frame a Foundation, and arrange its working details, requires, then, that the Founder combine with his benevolence a mind unusually rich in political wisdom, and a judgment unusually free from petty influences. But even when such a man has accomplished such a scheme—even when all its details have been wisely planned, and all conceivable provision made for ensuring perpetually their faithful execution—even then the task is not completed. He has provided for the present; he has provided for the future—so far as its perils may arise from within; but it still remains to provide for all that the future may bring about outside the Foundation. He has to cope with the constant and inevitable operation of—what I will venture to term—'the Principle of Obsolescence.' He must devise means for the future revision and readjustment of his schemes.

If this be not done, time will soon set at naught his ephemeral design. The foundation may survive in useless perpetuity for ages after the evil which it was designed to remedy has disappeared for ever. So limited is the range of human foresight, that no founder can be sure that he is not providing a permanent supply to meet a merely transient need. The men who left property for ever to redeem English slaves from the Moors, or to exempt their parishes from paying Fifteenths, were not more shortsighted than the average of their contemporaries.

Or the current of hostile circumstances may take a different turn, and, without affecting the evil, may so affect the remedy as to make it only exaggerate the evil, and thus turn

the antidote into a bane. A petty endowed school, that originally made its village a speck of light in the darkness, comes at last, when the land is covered with a network of primary schools, to be the means of keeping that village darker than all those around, by preventing the establishment of an efficient school, with State inspection.

The Founders of mediæval times did not foresee that such changes were inevitable, and that it was imperative to provide for a revision. The example of Dean Colet shows us, however, at how early a date the danger and the remedy were detected by experienced men.* At the present day no Founder can fail to be alive to them.

Yet the comparative rarity of such provisions as those of Colet or Hibbert shows how little effect the knowledge of these dangers has in mitigating the vanity which leads a man to overrate his own foresight, and the self-love which makes him care little for good being done if it is not done in the way he has himself invented. Let us suppose, however, that such provision has been duly made. To what extent is it likely to prove effective?

Turgot points out three causes which impede the operation of all schemes for revision.

First of all, there is the long period which usually elapses after a Foundation has become useless before its uselessness is detected. The persons who are immediately acquainted with the charity are too much accustomed to its working to be struck by its defects; whilst those who are not immediately acquainted with it have little chance of observing the defects. Hence Foundations sometimes become actually hurtful before anyone suspects that they have even ceased to do good.

Secondly, when the need of revision has been detected and demonstrated, there is still the difficulty of determining the proper character and extent of the modifications—a difficulty which is often enhanced by the fact of the Foundation being one of a large class upon which any such modification will be apt to tell, either indirectly or directly.

* *Infra*, Part V.

Thirdly, when the scheme of modification has been fully planned, there is the difficulty of obtaining its adoption in the teeth of the vested interests — lawful and unlawful, definite and indefinite—that have grown up around the old system, and offer resolute resistance to any attempt to initiate a reform, lest it should end in an assault upon themselves.

We had already learned that even the best framed Foundation is likely, in the changes of society, to lose its early value, and to become useless, if not injurious. We now learn that, even under the best framed powers of revision, a considerable period of time is likely to elapse after it has lost its value, before that loss is effectually remedied.

This elaborate survey of the perils that environ a Founder might well suffice, as Turgot prayed, "concourir avec l'esprit philosophique du siècle, à dégôuter des fondations nouvelles et à détruire un reste de respect superstitieux pour les anciennes!" Already a sense of these dangers was abroad, and had found concrete expression in the Edit des Mains-mortes of 1743, which forbade all religious houses to acquire any more lands without a Royal licence, and to acquire any property whatever under Wills—an edict which continued to be the law of Lower Canada until the present reign. The doctrines of Turgot sank deep into the mind of Europe. In the next generation, the author of *The Wealth of Nations* proved them to be applicable even to the least objectionable of all foundations—those devoted to educational uses. Half a century afterwards, when the reconstructive reaction had set in, Chalmers,* in a memorable volume, grappled with the arguments of Adam Smith; and Stuart Mill † condémned the extreme position of Turgot as a temporary exaggeration. But Turgot's arguments have effected at least a modification in the general attitude of educated men towards endowed charities, whilst his views are still maintained, in all their integrity, by authorities as skilled in practical politics as

* *On Educational and Ecclesiastical Establishments.*

† *Jurist*, 1833; reprinted in the first volume of his *Dissertations*. See his *Autobiography*, pp. 182-3.

Mr. Lowe, * and in speculative politics as Mr. John Morley. The latter has recently recorded his opinion that Turgot's essay on Foundations "still remains the most masterly discussion that we possess of the advantages and disadvantages of endowments. Even now, and in our own country, the most fertile and beneficent work to which a statesman of energy and courage could devote himself, would be the application of the wise principles which were established in the *Encyclopédie*." †

The premises of Turgot are, indeed, unassailable. The perils which he enumerates have been proved real by painful and universal experience. But his sweeping practical conclusion is no necessary consequence of his premises; and it is possible to admit all the dangers he fears without accepting the drastic remedy he recommends. We are compelled to concede to him that many endowed charities are, by their very constitution, injurious; that others, by various social changes, have ultimately been rendered injurious; and that, even in the best, there is an inherent tendency to become worthless. We cannot dispute the conclusion of Mr. Lowe, that "endowments carry in their own bosom a principle of caducity and decay." ‡ But does the truth of these generalisations involve the inference that we must prohibit all endowment? *Is there a single human impulse, usage, or institution, of which they do not equally hold true?*

Turgot's arguments do, indeed, lead us irresistibly to the conclusions that we must not permit endowments to be created indiscriminately; that we must never cease to surround them with the spur and bridle of authoritative supervision; and that we must provide duly for their periodical readjustment. But these conclusions are applicable to every human law, and to every relation that human laws can create. If their application to endowments seems novel, it is only because endowments have too often been treated as an exception to the most fundamental rules of

* See his *Middle-Class Education*, to which J. S. Mill replied in the *Fortnightly Review*, vol. xi.; and his evidence before the Schools Inquiry Commission, Questions 6541 and 6556.

† *Diderot, I.* 186. ‡ *Middle-Class Education*, p. 10.

law and polity. Beyond these conclusions Turgot's arguments cannot logically be pressed. They afford no warrant for his inference that all endowments must be prohibited, and that the utmost organisation which can be conceded to benevolence is that of voluntary associations supported by periodical subscriptions. That endowments are apt to be misused is ground enough for setting safeguards on their use. It is no ground for prohibiting it. To abolish Foundations, instead of taking the trouble to control them, is like breaking a watch-spring for fear it should run down. It is the same wasteful policy that hanged criminals when it might have reformed them. If all endowments have had defects, so have all other human institutions; and it is from the nettle Mistake that we pluck the flower Experience. "In this, as in most questions of state, there is a middle. There is something else than the mere alternative of absolute destruction or unreformed existence. . . . A disposition to preserve and an ability to improve, taken together, would be my standard of a statesman. . . . He does not deserve to rank high, or even to be mentioned, in the order of great statesmen, who having obtained the command and direction of such power as existed in the wealth, the discipline, and the habits of such corporations as those which you have so rashly destroyed, cannot find any way of converting it to the great and lasting benefit of his country. On the view of this subject a thousand uses suggest themselves to a contriving mind."*

It will be time enough to check charitable gifts for mere checking's sake, when we find that they have absorbed as much of the nation's wealth as charity can find a public use for. In England, at any rate, there is no fear of that epoch arriving without our knowing it; for the Mortmain deeds enrolled in Chancery, and the returns and records of the Charity Commission, keep us sufficiently informed of the rate of increase. How remote a time it must as yet be every man knows who has visited the closes of Edinburgh, the wynds of Glasgow, or the courts of Bethnal Green.

* Burke's *Reflections*.

Until it does arrive, we shall be as little justified in prohibiting the owner of property from giving it to benefit the many as from giving it to benefit an individual. In the one case, as in the other, we may content ourselves with restricting him to the reasonable limits of human foresight, and forbidding him to fix irrevocable benefits upon persons so remote that he can form no estimate of their merits or their wants.

The wealthy Endowments that abound in England have no doubt been amongst the causes of her pre-eminent advance in civilisation, as well as a potent factor in shaping the national character. Very instructive is the contrast between her and modern France, since the Revolution swept away all the ancient establishments for public uses, and left no intermediate link between the State's coffers and the private purse.

'Charity.' we may be told, 'should begin at home;' but, to use a trite reply, there is no reason why it should end there. Granting that a man should provide first for those of his own household, this will involve no more sweeping measure than that of fixing a "Legitim,"* *i.e.*, a proportion of property which he cannot bequeath away from his family. And our experience of human nature may suffice to assure us that, even in the absence of any such measure, family love or family pride will usually be found far stronger than public spirit, and that in but few instances will general benevolence counterbalance private affection. Vanity, indeed, may do so; but against vanity it is easy to legislate, and to forbid, if need be, the connection of a founder's name with his foundation.

A singular argument has often been urged against legalising the establishment of Foundations by acts of last Will. Such gifts, it is said—and with justice—since they cost the giver nothing, are not worthy to be ranked as acts of charity. There is no merit in them. The worth of a Charity must be measured, not by what the donor gives, but by what he gives up.

* *Infra*, Part III., sec. iii.

However true this ethical judgment may be, it is a fallacy to infer that, because an act calls for no special moral eulogy, it ought therefore to be legally prohibited, or even that it must necessarily be unworthy of special legal favour. It is the very duties which are so simple as to be least meritorious to do, that it is the most criminal to omit. The duties which we go out of our way to praise a man for observing, are precisely those which the lawyer dismisses with indifference, as of "imperfect obligation." The State, whose very existence depends upon taxes which are only paid under compulsion, cannot consistently refuse endowments on the mere plea that the gift of them is not inspired by heroic virtue. It must rather, as Crabbe suggests, deem itself

> "Happy, when fears to public spirit move,
> And even vices do the work of love."

Very common however, has been this confusion between the objective public usefulness of a charitable gift, and the subjective merit of the giver. It is a confusion common both amongst the advocates and the opponents of endowments. On the one hand, the politicians of 1736 denounced and prevented many gifts of high public utility, because there was no merit in the giver's motives; on the other, the opponents of the charity reforms of the present reign have defended many injurious institutions merely from admiration of the meritoriousness of the 'pious founders.'

Even Mr. Gladstone, in attacking the exemption of endowed charities from taxation, treated this want of merit as a consideration worthy of being impressed upon the House of Commons, and reminded them that "what a man wills on his death-bed, when he can no longer keep it in his own hands, is not charity in the same high and sacred sense —the only legitimate and strict sense in which the gift of money can be charity—which the word carries when a man gives what is his own to give or to enjoy. . . . . The Will does not take one tittle from the pleasure of possession and accumulation, nor from his personal enjoyment, but operates after his death; so that, without the smallest effort, or the

most minute surrender, he may achieve the fame of being a Founder." *

But it must be remembered that in many cases a charitable bequest is not the substitute for a life of beneficence, but the consummation of it; the Founder having habitually given away in his lifetime all that he prudently could, and reserved for his bequest only what he could not prudently have given away, either because he needed it for his own support, or because he found it desirable to accumulate all possible experience before irrevocably determining the details of his Foundation.

If we are correct in maintaining against Turgot that endowments, in themselves, are not to be rejected, it will not be difficult to determine the province in which they may advantageously be permitted. Their principal office appears to be, to forward those public works whose necessity the more acute observers have begun to detect, but which the public, whether by voluntary association, or as organised in the State, cannot or will not as yet undertake to execute; in other words, to supply those needs which only a minority —it may be a minority of only one man—is as yet convinced ought to be supplied by bystanders, and not left to the individual who is in need. Hence, in a progressive society the province of endowments is always shifting, as the organisation of the State gathers strength and scope. Thus in England, the interests of Pauperism, of Highways, of Primary Education—which once were dependent on the protection of individual Founders—have passed into the direct care of the nation, and no longer afford a sphere for the operation of endowments. The creation of an efficient police has removed all need for those charities which Sir Francis Moore mentions, "to provide the poor with weapons for the defence of their houses." On the other hand, the abolition of compulsory church-rates has opened a new sphere for endowments, to maintain the parochial ecclesiastical fabrics.

In a word, the main office of endowments is to afford a field

* Gladstone's *Financial Statements*, pp. 430, 432.

for experiments in benevolence. It will, perhaps, be objected that so narrow an office removes all need for perpetuity, and confines endowments to a limited—though it may be a considerable—duration. We would reply that a limited duration is all that can safely be conceded to a Founder's schemes; that the vain ambition of perpetuity has been the chief cause of the evils of Foundations; and that in the acceptance of this temporary character lies the solution of the controversy between endowments and their assailants.

But for the funds which endowments afford, how many sociological questions are there which could never have been effectually tested by experiments, whilst mere deductive reasoning would never have sufficed to solve them. What is the best mode of providing for orphan children? If we assemble them in large numbers in boarding schools under strict discipline, will the effect be, as some founders have anticipated, to produce a peculiar purity and intensity of moral and religious character? Or will the plan serve only to extinguish the children's affections, on the one hand, and on the other to stunt their mental growth by confining them to a monotonous daily experience wholly at variance with the actual scenes which await them on their departure into the world outside? What, again, would be the results if we adopted the opposite plan, of boarding them out as individuals amongst separate families? Or if we combine the two plans, and place the children amongst families, but group all the family households, as at Farningham, upon a single charity estate?

It must, however, be remarked as a curious fact that in the province of mental education, endowments do not seem to have been employed to the extent that would have been anticipated, in making educational experiments. Mr. Fitch,* a most competent witness, says that he has not been able to find a single instance in which any new or original system of education has been directed by a Founder's will. Still it must be remembered that the man who is philosophical enough to find a new plan of instruction, is rarely rich

* Journal of the Society of Arts, 1869, p. 685.

enough to found it. But it cannot even be claimed that endowed schools have done much in supplying a field for originality on the part of the teachers employed in them. It was not in them that Pestalozzi, Fellenberg, and Jacotot worked out their theories. The extraordinary educational experiment of Matthew Davenport Hill and his brothers was tried in a private school. In fact, the Schools Inquiry Commissioners go so far as to say that private schools are "*the natural field* for teachers who hold peculiar views, . . . the men who most often make improvements, and discover new methods."*

Adam Smith, in dealing with the question of educational endowments, admitted that schools for "the lower orders" might well be subsidised; but contended that all other cases should be left to the ordinary laws of supply and demand. Why should a Founder go out of his way to pay for what would pay for itself? Chalmers replied that the principle of Free-trade had no application in the provinces of morals and intellect; for in them the need is always in the inverse ratio to the conscious demand—the man most ignorant is the least likely to ask for instruction. Free-trade may safely be relied upon wherever three conditions are present—the consumer must have money enough to buy, must care enough for the article to buy it, and must be judge enough to know if what he buys is good. In the case of education it too often happens that every one of these conditions is wanting.

A further important sphere for endowments lies in supplying the permanent *matériel* of a charitable institution; things whose large cost renders it difficult to obtain them out of the subscriptions or the rates of a single year. A benefaction of this kind is not only peculiarly useful, but is peculiarly free from those hazards of misapplication which beset income-producing capital. A bell, a bridge, or a building offers comparatively little scope for the perversions of time or the misconduct of trustees. Many such benefactions are still needed in England. Even amongst our endowed grammar schools it was found in 1868 that "at least

* Report I., 304.

half are without doubt insufficiently—and probably only a quarter can be considered fairly—provided with site and buildings."*

Even Mr. Lowe† admits that "as the failure of endowments arises from the impossibility of overcoming the tendency to languor and decay in human agency, any appropriation of money to buildings, to libraries, or to museums would be free from the objections I have urged." And there is good warrant from experience for approving of the application of endowments even to further purposes than the mere supply of fixed capital. The Public Schools Commission reported ‡ that "To a large popular school, so long as it is large and popular, a permanent endowment is not of essential importance; but there can be no doubt that such an endowment is of great service in enabling any school to provide and maintain suitable buildings; to attract to itself, by exhibitions and other substantial rewards, its due share of clever and hard-working boys; to keep up by these means its standard of industry and attainment, and run an equal race with others which possess this advantage; and to bear, without a ruinous diminution of its teaching staff, those fluctuations of prosperity to which all schools are liable." And it is reported by a special Commissioner that "the best parochial schools in Scotland are those assisted by the Dick and Milne bequest"—though for a special reason, since "the master cannot get his share of that endowment without passing a great many scholars, and being a meritorious teacher."§

The result of our inquiry is thus, upon the whole, to justify the legalisation of Endowed Charities in a well-ordered State. But in a nation which, like ours, is no less remarkable for the importance of its charitable Societies than for that of its charitable Endowments, it is important to guard against a popular confusion of ideas, and to insist upon the difference of character between the two. Had we

* Report of Schools Inq. Com., I., 260.
† *Middle-Class Education*, p. 28.
‡ Parl. Papers, 1864, xx., p. 4.
§ *Ibid*, 1873, viii. 195.

failed to find any justification for the Endowments, the failure would not have involved any condemnation of the Societies.

Even the extreme objections of Turgot are aimed only against the permanent endowment of charities, not against their conduct by organisation and association. The administration of charity upon the gigantic scale may, indeed, possess material advantages over its administration by the detached efforts of unconnected individual benefactors; not merely from the additional wealth that is brought to bear, but also from the greater wisdom which the greater choice of leaders will probably bring to bear upon its direction, and from the economy which united organisation secures by preventing "the overlapping of relief." We are too apt to be misled by appearances, and to suppose that amongst charities the great distinction of type is that which separates the direct and therefore minute exercise of individual personal beneficence, from its administration on a large scale through the hands of a paid staff. But to the eye of a discerning politician the real distinction lies lower, and does not depend, either upon the scale of the beneficence or even upon the question whether it is exercised mediately through subordinates or personally by the donors, but upon the presence or absence of the donors' supervision. A large charitable society may be as completely under the control of its subscribers as if each of them gave his money directly to the ultimate recipient of the bounty; and all that is needed is that the contributions be sufficiently large to awaken the subscribers' interest in their application. (For charities supported wholly by the driblets of a "Hospital Sunday" would be under no effective control; no contributor's mind would follow the fortunes of the coin he put in the plate. During the present year two criminal prosecutions have disclosed the state of things that prevails in Children's Homes which are supported by casual alms obtained in house to house visitation, and which consequently are entirely unchecked by those who support them). If the subscribers detect an abuse they can easily interfere,

whilst in an endowed Charity any interfering critic is considered an intruder; and if their interference fails, they can easily enforce their criticism by withdrawing their subscriptions. On the other hand an endowment, large or small, is by its very nature placed beyond this control from the outset of its existence; and the utmost resources of the statesman must be taxed to supply artificial substitutes for the prudence and the zeal which are buried in the donor's grave. But where there are subscribers, the Founder never dies.

The criticism of Endowments, therefore, even if it go to the full extent of Turgot's condemnation, does not involve any depreciation of the virtue of beneficence, or even of its exercise upon a gigantic scale. Public spirit is still to be preferred, none the less, to parsimony, and charity to churlishness. The one point is that the almoner must add to his charity, knowledge; that he must direct his gifts wisely, and that he must sedulously avoid exaggerating the range of his wisdom.

Where the evil to be grappled with is one which exceeds the resources of an individual, it will still be open to him to seek allies. A charitable partnership is in itself as little objectionable as a commercial partnership, and may be as necessary. It is only necessary that the periodical contributions be sufficiently large to make the contributor care about their application; and that they fall due at intervals sufficiently frequent to make any loss of confidence promptly felt. We then obtain an instrument of beneficence free from most of the drawbacks and dangers that surround Endowments, and possessing a flexibility of application and an expansibility of wealth which can seldom be expected in Endowments. It works more cheaply and honestly, it varies its work more aptly and more promptly, it enlarges or diminishes its resources in closer proportion to the demands of its work. If an abuse creeps in there is every chance of its being promptly detected. If money is wasted on dinners or architecture, there is every chance of the waste being criticised. And no land is withdrawn from efficient cultivation or rendered unsaleable.

But however perfect [illegible] in which the charitable aid is applied, Turgot insists that its application must be limited to those [illegible] which are strictly "Occasional," or Accidental [illegible] as the relief of distress which has been [illegible] by an epidemic, the improvement of a [illegible] local encouragement of agriculture. On the other hand those "General" evils which fall upon all the [illegible] independently of time or place, like the ordinary [illegible] and instruction, it should be left to [illegible] to provide against. "Les hommes sont [illegible] intéressés au bien que vous voulez leur [illegible] voilà le grand, l'unique principe." But as we have already seen, this principle of Turgot's may [illegible] astray, if, like him, we extend it to all cases of [illegible] forgetting how often men fail to subjectively realise [illegible] *interest in*, their deepest interests. These evils are too wide for any man, any association, any [illegible] for the State to grapple with; though the State may assist in reducing them to their natural limits by removing all laws which artificially check industry or instruction, or interfere with the enjoyment of their fruits. If a man eats without working, it must be at the expense of some other man who does work; and it is therefore impossible by any arrangements to permanently relieve any extensive proportion of the community from hunger except by their own exertions. But to quote the jingling proverb,

> "If everyone will see to his own preservation,
> Then very easily you may preserve a nation."

Similarly in the case of mental needs charity, says Turgot, can seldom have the wealth to do much by such expensive methods as the establishment of schools or colleges; although by establishing prizes it may very cheaply stimulate [illegible]ion throughout a wide circle, just as the State by [illegible] intellectual test from candidates for its em- [illegible]y affect the level of education throughout an [illegible]m.

PART III.

SHOULD RESTRICTIONS BE IMPOSED ON THE CREATION OF CHARITABLE ENDOWMENTS?

'What has he left? and who's his heir?'
'I know no more than what the news is;
'Tis all bequeathed to public uses.'
'To public uses! There's a whim!
What had the public done for him?
Mere envy, avarice, and pride;
He gave it all, but first he died.
And had the Dean in all the nation
No worthy friend, no poor relation?
So ready to do strangers good,
Forgetting his own flesh and blood!'

SWIFT. *Lines on his own Death.*

Our inquiry has now led us to the conclusion that the lawgiver should not utterly prohibit charitable endowments. We may therefore proceed to consider the measures which he must take with regard to them, for Restriction, for Supervision, for Revision. First, then, let us ask in what cases it will be desirable for him to place any Restraint on their creation.

There is no portion of our subject upon which it is more difficult to lay down general rules than this. The various circumstances of various nations or centuries will produce a wide diversity in the extent and character of the evils to be guarded against, as well as in the nature of the appropriate safeguards. The need for new charitable enterprise, the conditions of land tenure, the strength of family expectations, the prevailing degree of religious and philanthropic zeal, the attitude of the clergy—all these varying elements must be guaged by the statesman who at any given moment has to frame an appropriate law of Mortmain. In some countries the public need, or the private apathy, or the private wisdom, may be so great that the law is called upon for no restrictions. Thus in the United States of America

our Mortmain laws have not been generally adopted; * and corporate bodies are freely allowed to acquire property with no restrictions except such as may be contained in the charters or enactments by which they have been incorporated, and which often prescribe a maximum limit to the real and personal property that the individual corporation can hold.

It is a familiar objection to all legal restrictions upon charitable gifts, that they tend only to drive benevolent people to commit 'frauds upon the law,' and evade the prohibitions by means of secret honorary trusts. The testator will give his property, apparently as a beneficial gift, to some person who will be morally pledged to him to apply it to the discharge of the Trusts which the State will not permit to be openly attached to it. But whilst we may admit that every statute of mortmain is sure to be evaded in many instances by arrangements of this kind, it must be remembered as well that such evasions will always be limited in number by the difficulty of finding persons in whose honour the testator has the absolute confidence that such a trust implies, as also that they are free from much of the evil against which a statute of mortmain is directed. By the very conditions of the case, the honorary trustee is rendered the absolute owner of the property, with all the rights and powers of ownership; and thus all the much-dreaded evil of inalienability, all the tenacity of the 'dead man's grasp,' entirely disappears. The hazard, again, of a testator's preferring his scheme of charity to the interests of his family is certainly no greater when his plan is effected by a secret instead of a legal Trust; and, indeed, it is rather lessened, because, as the world at large will have no means of knowing that the gift has been accompanied by any charitable directions, their censure of the injustice of the gift will be all the more severe; and few testators are altogether indifferent to the prospect of posthumous censure. The common objection to secret Trusts is, that the bene-

* In Delaware the Act of 1736 has, however, been adopted. *Revised Code* of 1852, ch. 39, s. 10.

ficiary has no security for their being fulfilled. But as, by the very hypothesis, the Trust is one which the law desires to prevent, this objection is of no weight.

Such trusts are often employed in England at the present day. Sometimes it is for the purpose of devising land to charities which have no power to take lands under a will, the devise being made to some one who is expected to transfer the land to the charity by a deed *inter vivos*. Sometimes it is for the kindred purpose of obviating the uncertainties of life, by securing to a charity money which the devisee is to realise from the sale of lands, if the testator does not live long enough to convert them into money, and so to render them capable of being bequeathed to charity. Sometimes it is for the purpose of saving the legacy duty on a bequest of money to a charity, the bequest being made to some relation so nearly akin to the testator as either to have, like his wife, to pay no legacy duty at all, or at least to have to pay it at a less rate than the 10 per cent. which the charity would have to pay. In the two former cases the gift will be set aside, as a fraud on public policy, if the devisee can be shown to have assented to the secret Trust.* But in the third case, the Trust, although not enforceable by law, is not prohibited by law, and it may be avowed with impunity upon the face of the gift. The following form for this purpose is supplied in a familiar collection of Precedents :—

"I bequeath the sum of £—— unto my wife C. B. absolutely. But it is my wish that the said sum be distributed by her my said wife, according to her discretion, for public charitable institutions and private individuals. Nevertheless, I declare that such the expression of my wish shall be precatory only, not imposing on my said wife any legal or equitable obligation, condition, trust, or election whatever, or interfering with her full and absolute right of property in relation thereto. And I direct that the said legacy shall be fully paid out of such part of my personal estate as may legally be devoted to charitable purposes, and shall be paid out of that fund in preference to all other pecuniary legacies bequeathed by this my will."

A further objection to these restrictions lies in the abundant litigation to which they give rise. Kinsfolk who

* *Sweeting* v. *Sweeting* (3 N. R. 240); *Jones* v. *Badley* (L. R. 3 Ch. 362).

would not have disputed a testator's discretion in distributing his gifts among themselves, feel little scruple in disputing any gift which passes over the whole family in favour of unknown strangers. Of course every additional requisite which the law imposes on the validity of a gift must afford another chance of its validity being successfully disputed. It has even been suggested that if the "Mortmain Act" of 1736 were repealed, charities would gain as much by the prevention of litigation about gifts already valid, which then would always reach them without paying the costs of a Chancery suit on the way, as by the new gifts which under the present law would be manifestly invalid.

The various restrictions which States may see fit to impose upon the creation of charitable endowments may be grouped under nine heads, accordingly as they relate to (1) the Purposes for which the endowment is given; (2) the Nature of the subject matter of the gift; (3) the Extent of that subject matter; (4) the Person by whom, and (5) the Person to whom it is given; (6) the Time when the gift is made, and (7) the Time when it takes effect; (8) the Solemnities accompanying it, and (9) the Publicity which it must receive. These several topics require detailed consideration.

I.—The Purposes of Endowments.

What restrictions is it desirable for the State to impose upon a founder in the choice of a benevolent purpose to which to devote his endowments? It will be denied by no one that some such restrictions will be necessary, that purposes may commend themselves to the imagination of even a truly benevolent man, which nevertheless no prudent State could permit him to forward by a permanent endowment. Even the English law furnishes us with precedents of gifts to public uses which have been set aside as contrary to public policy. One testator bequeathed £5000 to be applied in discharging offenders who had been committed to prison for non-payment of fines under the Game Laws. His

bequest was declared void.* Another left a legacy to provide those inmates of a workhouse who were above the age of sixty, "with one pint of porter." Unless the local guardians sanctioned such a gift, it would be a contravention of the Poor Law Amendment Act.† A third made a bequest "towards the political restoration of the Jews to Jerusalem and to their own land." It was held void as being incompatible with international comity.‡ The gifts that have been declared invalid on account of their "superstitious" character are innumerable.§ Thomas Gray's bequest of five shillings a year to the incumbent of Melbourne, Derbyshire, for reading his Will after the prayers on every St. Thomas's Day,‖ is of but doubtful validity in the face of the Act of Uniformity. Until the Toleration Act of 1689, all gifts for the support of Dissenting worship would have been void.¶

The English law has in fact distinguished gifts to public uses into three classes; there are those which, as we have just seen, it prohibits, there are those which it permits to be created under certain conditions, and there is a still more favoured class which, as we shall very shortly see,** it exempts from these conditions. This policy of discrimination is undoubtedly sound. But it is to be desired that full advantage should be taken of the accumulated results

* *Thrupp* v. *Collett* (26 Beav. 125).

† *Att.-Gen.* v. *Vint.* (3 De G. and S. 704).

‡ *Habershon* v. *Vardon* (4 De G. and Sm. 467).

§ See Shelford *On Mortmain*, pp. 88-116.

‖ Seventeenth Report of Charity Inquiry Commissioners, p. 296.

¶ See Lord Mansfield, in House of Lords' Journals xxxi. 475. It is not generally known, but we shall subsequently see the importance of remembering, that long after the Toleration Act had legalised Dissenting worship, the legality of Dissenting charities was matter of grave doubt. In 1713 Lord Harcourt doubted if a gift for the Anabaptist poor would be valid. "It might," he said, "be a means to draw Dissenters from the Church. It is one thing to tolerate Dissenters, and another to establish a perpetual fund for their support" (2 Ves. Sen. 274). What judgment he finally gave is not known. No clear decision on the subject appears until Lord Hardwicke, in 1748, upheld a Quaker charity; (*Att.-Gen.* v. *Andrews*, 1 Ves. Sen. 225). As late as 1751 Sir J. Strange heard argument on the question, and said, "I own I am surprised there have been no other cases" (*Att.-Gen.* v *Cock*, 2 Ves. Sen. 273).

** *Infra.* p. 68 and p. 77.

of modern economical experience, by readjusting the lines of demarcation. On the one hand, the exemptions contained in the Act of George II. are, as we shall see, open to considerable criticism;* and, like some of those which have since been added to them, were selected upon no basis of principle, but merely as convenient concessions to powerful applicants. On the other, our increasing insight into the problems of social existence, enables us to detect the fatal tendency of many charities which the law has not yet branded as contrary to public policy.

An important practical question would arise in determining the mode of readjusting our lines of discrimination. It might be effected simply by general enactment of the Legislature, specifying the particular classes of foundations, or conditions in foundations, which are to be prohibited, permitted, or favoured; and the experience of a quarter of a century has supplied the Charity Commissioners with ample materials for determining those classes. Thus the School Inquiry Commissioners proposed† that Parliament should prohibit all founders of schools from giving the teachers a freehold in their offices, or guaranteeing them any further income than a sum proportioned to the grade and size of the school.

On the other hand it might be effected by the more flexible plan of submitting each individual Foundation to the judgment of some public authority which (within, if need be, certain general rules prescribed by Parliament) should exercise its own discretion as to permitting or prohibiting its establishment. In the Board of Charity Commissioners, England of course already possesses a tribunal peculiarly skilled in these delicate considerations of public policy, and with special means of obtaining that local information on which the determination of every such case must depend. Where the Charity is to be founded by a will it would be desirable to permit the testator, though scarcely desirable (as has been proposed) to require him, to submit his scheme for prospective sanction or rejection

* *Infra*, p. 61. † Report I., 599.

during his lifetime, in order that, in case of its rejection, he may have the opportunity of framing an alternative one. In a country where the law makes no general provision of a Legitim* for the families of testators, it would be desirable that the proposed authority should be directed not to sanction any charitable bequest without considering, not merely its intrinsic merits, but also its effect upon the near relatives of the founder.

Lord Selborne has expressed himself as "very much inclined to favour" the adoption in England of this plan of the individual authorisation of Endowments.† It prevails on the Continent, and it appears to work well. It was adopted in Austria by an ordinance of Maria Theresa,‡ and exists throughout France, Germany, and Italy. In France in 1814, it was enacted that every gift of personalty to a greater amount than 1000 francs, and every gift of realty, must be expressly sanctioned by the State.§ "To enable even a *personne civile* to accept an endowment, an express authorisation of the administrative authority is in each case required, and the deceased donor's natural heirs are heard. They are not heard on any point of Law; if any such arises it goes to the ordinary legal tribunals; they are heard on the question whether the bequest was a proper one for a man in the testator's condition of family fortune to make. In some cases it is the *préfet* who gives this authorisation, with the advice of the *conseil de prefécture*; in general, and always when there is opposition on the heir's part, it is the Council of State." ||

In the elaborate outline for a new Law of Charities which was sketched twenty years ago by Lord Hatherley,¶ great scope is given to the right of individually authorising or vetoing the Founder's choice of purposes. If his gift is

* *Supra*, p. 22.

† *Report of Schools Inquiry Commission*, Evidence, Q. 14,215.

‡ Report of Mortmain Committee of 1844, Parl. Papers, 1844, x., 507, Evidence Q. 681-716, 1451.

§ Sirey, *Les Codes Annotées*, art. 910.

|| Arnold's *Schools and Universities on the Continent*, p. 21.

¶ *Transactions of the Social Science Association*, 1859, p. 191.

made by will, and to an amount exceeding £200, it must either be for a purpose which has already been sanctioned both in principle and detail (by a Commission under the statute of Elizabeth, or by Chancery, or by the Charity Commission), or else must be treated as a merely temporary arrangement which will hold good only for the period of "a life in being and twenty-one years afterwards" conceded to private settlements, and then must be revised by public authority. If the gift is made *inter vivos*, it must (1) be made to some existing charity which has been sanctioned by one of the three bodies already mentioned, or (2) must be for one of certain highly eligible purposes (*e.g.*, a school or hospital), which the Act will specify, or else (3) its principle must be submitted to the Charity Commissioners by the donor, and must receive their sanction, or that of Chancery upon appeal from them: and in any of these three cases, the details of the scheme must be submitted to the Charity Commissioners for their sanction.

But to the plan of authorising Charities individually, there is at least one serious objection. If we consider the habits of routine which so easily beset all Boards, we shall be apt to conclude that if any public authority were intrusted with an inordinate right of veto upon all proposed charities, the prospect would be very small of any novel experiment being allowed a trial. Very instructive is the example of Brown's bequest to the University of London, for the establishment of "an institution for the care and treatment of animals and birds useful to man;" which ran the gauntlet of discussion both in Chancery and in Parliament. The present state of veterinary science is confessedly low. The diminution of the sufferings of the brute creation is usually regarded as a laudable work of mercy. The preservation of our domestic animals is a matter of everyday economical interest. Mr. Brown's proposal might therefore seem to be one which had every claim to respect and approval. But it was novel. It was genuinely an experiment. The mere fact of its novelty ensured its condemnation at the hands of many men, even of humane character

and of reforming tendencies. The Bishop of Down and Connor denounced it as "a very foolish and eccentric bequest."* Mr. Fitch † declared that, if carried out, it would "incur the ridicule of all the Universities in Europe." What hope would such a bequest have had of being recognised by any Board, or Department, or Commission, when the pigeon-holes of the office contained nothing similar, and the file afforded no precedent? Yet, as Mr. J. S. Mill says, "a person willing to employ part of his superfluities in establishing an Animal Hospital, is not born once in several centuries." The uniqueness of the bequest provokes hostility; though it is this very uniqueness which constitutes its claim to protection.

(This example may serve to show how much darkness still hangs over the whole theory of charities; since, besides all the divergences of opinion with respect to principles, there are equal divergences of opinion as to the application of those principles to individual instances. A curious illustration is afforded by the case of Archbishop Abbot's Hospital at Guildford, which Sir Francis Palgrave‡ singles out as a chief object of eulogy, whilst Sir Arthur Hobhouse§ is content to take it as one of his four typical instances of failure. Its details we shall subsequently discuss.||)

But if a Charity Department would not be likely to give its sanction to an Animal Hospital, how slight a chance would there be of its permitting the still bolder experiments which recent years have seen attempted by philanthropists of independent habits of mind. There is the Cornell University, which requires every student to do daily manual labour for his support; there is the Temperance Hospital in the Hampstead Road, for the treatment of disease without alcohol; there is the Homœopathic Hospital; there are the schools for teaching Phonetic Spelling; there will soon be a Cremation furnace; there may some day be another Arminian Nunnery, after the manner of Charles I.'s time.

* Hansard, clxxxviii. 495. [A.D. 1867.]

† *Fraser's Magazine*, 1869, p. 8.

‡ Mortmain Committee's Report of 1844. Evidence, Q. 144.

§ Journal of the Society of Arts, xvii., 680.

|| *Infra*, Part V

All these are experiments in subjects of the utmost importance; but which of them could hope for mercy at the hands of a Charity Board?

Whichever mode of authorisation, however, were adopted, we may anticipate to some extent the new classifications which either Parliament, or any sanctioning Authority, would be likely to frame. Their special favour would probably be reserved for charities devoted to education or to the cure of disease. Their prohibitions would probably be extended to all charities devoted to the distribution of Doles, and, unless in exceptional districts, to all devoted to Loans or Apprenticeship fees. It is possible that at no distant date public opinion would advance to the point of prohibiting all religious endowments which were devoted to the maintenance of narrowly defined theological tenets.

There is probably no point in the whole subject of charities upon which so general an agreement would be found amongst all who have studied the topic, as the question of the good or evil of Doles—endowments for periodically distributing amongst a large number of people, small gifts, whether of money, food, or clothes. Economists, politicians, charity officials, parochial clergymen, are agreed in utterly reprobating such foundations.

This reprobation is, of course, a modern view, the result of long experience and long reflection, one of the many apparent paradoxes which the complexity of social and economical forces nevertheless renders demonstrably true. There can be no doubt that a man who clothes the naked and gives food to the hungry is usually doing a beneficent and meritorious act; and it is natural to infer that the wider the sphere and the more permanent the time through which this work of feeding and clothing is carried on, the greater in proportion will be the beneficence, if not the merit. Christendom for eighteen centuries has looked with reverence upon the Good Samaritan's gift of two denarii; how must it regard the beneficence of Henry Smith, who has caused 23,211 gifts of 4s. 10d. each* to be bestowed annually for

* Parl. Papers, 1876, xx., 23.

ever. Paradoxical as it may seem, educated modern Christians still venerate the Good Samaritan, but pronounce Henry Smith to have been a public nuisance. Experience has taught them three points of essential difference between the alms of an individual and those of a Foundation. The former are usually given with discriminating reference to the circumstances, the character, and the prospects of the recipient; but in the latter the distributors have seldom either the time, the zeal, or the intelligence thus nicely to adjust the relief to the need—and the wider the distribution the more indiscriminate it becomes; the vaster the "Charity" the worse its operation. The former, again, are not to be permanently counted upon, and even whilst the donor retains life and wealth, any misapplication of his first gift may dissuade him from repeating it; but the perpetuity of the latter renders them a permanent inducement to unthrift. Lastly, the former, as the evidence of personal kindliness, awaken that goodwill between class and class which is the cement of society; but the latter are received without gratitude as merely the inevitable results of machinery that was set in motion by some long-forgotten hand.

Of course it is possible, and perhaps only too common, for an individual's private charity to be given with an unwisdom that clothes it with much of the evil of a Dole. It may be given with a coldness or an insolence that renders gratitude impossible. It may be given with the recklessness that relieves every mendicant who asks. It may be given with a continuity that is even worse than that of a Dole, because it is apt to raise expectations of permanence which, unlike a Dole, it raises only to disappoint. Mr. Cumin tells the story of an old lady who gave away £20 worth of flannel every Christmas. The Christmas after she died the poor people came to the rector and complained, "If we had known she was going to die, we should have saved our harvest money, and bought flannel." And, conversely, it is possible for a Dole—as at Dorking, in Surrey, and at Singleton, in Sussex*—to be given with a painstaking intelli-

* Parl. Papers, 1868-9, xvii., p. 38.

gence that raises it to the value of private charity. It can best be done by obedience to Turgot's precept of relieving only Occasional and not General distresses;* singling out those cases in which the poverty has come by unexpected accident, and admits of ultimate recovery. It may thus become the means of preventing many persons who are as yet deserving and industrious from learning to rely upon the Poor Laws, and 'touching the unclean thing.' But in how few cases can a founder expect to find the administrators of his Dole possessed of the leisure, tact, and zeal for all the investigations that such administration as this will involve?

Looking to the general superiority of individual alms, which a man gives out of his own pocket and within a circle of his personal acquaintance, over those given from an Endowment, we may pronounce it to be not one of the least of the evils of Doles that their existence in any district tends to repress that private charity which would be far more beneficial. They not only operate for evil, but they supersede what might have operated for good.

Doles, again, produce evil effects upon the very persons who receive them. The confident expectation of a gift, a something which even he who will not work may eat, supersedes to that extent the necessity, the desire, and the habit of working. A shortsighted Founder concludes that it must be good for a man to have a shilling, or a loaf, or a pair of shoes given to him. He forgets that by slackening the man's habits of industry such gifts may in the long run materially lessen the number of shoes, loaves, and shillings that will come into his possession. It is an old remark that for every pauper that Doles prevent, they create three. Too often each distribution is followed by a week of debauch.

Moreover, the Dole is usually not obtained by the pauper's mere application, but by an application accompanied with some phrases of piety or flattery, and some assertion of poverty, an assertion whose truth it is usually well known is not likely to be strictly investigated. Habits of deceit-

* Supra, p. 30.

fulness, servility, and hypocrisy are thus readily strengthened or engendered; and Doles, as Mr. Cumin says, "create liars, or slaves, or both." In too many instances the Founder has expressly attached the condition that the recipients shall have attended at some specified act of Divine worship; as if the interests of Christianity could be forwarded by multiplying the disciples of the loaves. This, says Mr. Cumin, "is probably one of the worst conditions which can be attached to gifts. It is intended, no doubt, to promote religion—the danger is that it not only promotes hypocrisy, but excludes many poor people who although they do not or cannot attend Divine service, are much more in need of the charity than those who obtain it."* The curate of a parish in Berkshire, where there are many bread charities given in the church, reported that there was not a Dissenter in the district, but that the gift had a bad moral tendency.† Such at Hilderstone‡ is Sir Thos. Hunt's gift of 1625, of 2d. apiece weekly, in bread, to six poor people who "after service should come every Sabbath day to the stone where his father lays, and kneeling should say the Lord's Prayer, and pray to God for the King and Queen then reigning over them." Such also is Norrice's charity at All Saints' Church, Leicester, to forty-one poor people, who are to receive on St. Bartholomew's Day, 4d. each, "and to depart, glorifying God;" whilst the minister is to have 4d. for exhorting them, after the second lesson at evening prayer, "to praise God for his mercy in providing for the poor," and is "to make choice of some fit psalm for that purpose, desiring the people to sing that psalm with him."§ Such, again, is Joseph Allen's gift for the annual relief "of such poor women as are most regular in their attendance during divine service at the church of Gorey, in the county of Wexford."‖

They have also an evil effect upon the persons who do not receive them. These, who perhaps have also been led by them into the same laziness or the same lies as the actual

* Report of Pop. Educ. Comm., iv., 330. † *Ibid.*, vi., 513.

‡ Charity Inquiry Commissioners' Sixteenth Report, p. 333.

§ Thirty-second Report, v., 103. ‖ Parl. Papers, 1829, iv., 127.

receivers, may, unlike the actual receivers, have to suffer considerable pain from disappointment. Thus, at Salisbury, on an election to five vacant pensions in Popley's Charity, there were sixty-two applicants. For each who succeeded, eleven had in vain the anxieties of canvassing, and the vexation of failure.* "In every district," say the Poor Law Inquiry Commissioners, "the discontent of the labouring classes is proportioned to the money dispensed in poor's rates or in voluntary charities."†

All these things, it may be said, a Founder may have foreseen, and have deliberately resolved to hazard. But the most remarkable results of Doles are those indirect ones which utterly frustrate all the possible expectations of a Founder, and completely invert the effects he intended to produce. His object was to diminish the number of the helplessly poor of his favoured district. If the means he devoted to this object were at all extensive, they will result in greatly increasing that number. The prospect of the Dole attracts from all the neighbouring districts the most unsettled or most shiftless of their pauper population. The Foundation becomes, as Chalmers says,‡ an 'adhesive nucleus' round which the poor accumulate and settle, misled by vague hopes of benefits which, in most cases, it will fail to confer on them. At Draycott, in Somersetshire, a small village has been actually created by the foundation of a Dole.§

Moreover, the Founder's express object of adding to the means of each poor recipient is usually defeated by this very operation of the Dole. The influx of outsiders, who come in hopes of sharing in the distribution, raises the rents of houses and lodgings, and increases the expenses of the recipient by an amount exceeding all that the Dole adds to his resources. In some Cambridgeshire villages it has been noticed that the cottages let dearer because each cottager

* Report of Popular Education Commission, vi., 481.

† First Report (1834), p. 28.

‡ *Christian and Civic Economy.* Works xv. 98.

§ Report of Popular Education Commission, iv. 329. Third Report of Inquiry Commissioners, p. 425.

gets a loaf every Sunday. The poor man when treating with the landlord says, "You ask too much." "But you cannot have your loaves unless you live in this parish." * In such districts the Foundation that was meant to relieve the poverty of the poor, results only in increasing the riches of the rich. Still more evident is this result wherever the recipient of the Dole is also in receipt of outdoor relief from the Guardians, and has his allowance diminished by whatever amount he gets from the Charity. The Foundation only serves to reduce the poor-rates, and so subsidise the rich.

The evil of a Dole is usually in the compound ratio of two quantities: It varies directly with the number of the recipients, and inversely with the amount bestowed upon each. The smaller the capitation sum given, the more harm it does. A penny is at once spent in beer, when a pound would have gone to the tailor's. The greater the number to whom these sums are distributed, the more indiscriminate will be the distribution. The best Doles are small ones belonging to small hamlets, where the circumstances of every applicant are well known.

Just as, where the number of applicants is large in proportion to the number of administrators, the distribution is necessarily made with little discrimination, so also is it when the money to be distributed is excessive in proportion to the number of applicants. Hence some cases like that of Bewdley, where an Inspector reported of the annual "Mill and Meadow Money," that "no person who applies in time is refused. Many tradesmen receive it; some paying £100 a year rent have it." And like that of West Moulsey, where he reported: "Loaves and a barrel of beer are distributed yearly on November 13th. The distribution takes place at daybreak. The baker's cart drives across a field within the manor, and the loaves are thrown out, and picked up—in fact scrambled for by seventy or eighty people, usually persons going to Kingston Fair. . . . The beer is not given quite so indiscriminately. About thirty or forty persons connected with the place form a string, and, as they

‡ *Gentleman's Magazine*, lii. 290.

pass by the barrel, hand the drinking horn from one to the other, till the cask is empty."*

Among the most minute doles we may reckon the Penny Dole of Walsall, in Staffordshire, where† "there is an annual payment, called Moseley's Dole, of a penny apiece to all the inhabitants of the parish of Walsall and of the adjoining parish of Rushall. Three persons are employed to make the distribution, who begin on New Year's Day, and go through the parishes, giving a penny to every inmate of every house, whether permanently or accidentally abiding there. The earliest mention of this Dole is in the 36th Henry VIII., when £7 10s. 9d. discharged it." At Hampstead there is one still smaller. There is an endorsement on one of the indentures of gift to this parish, stating that £40 had been given by a maid deceased, to the intent that the Churchwardens of Hampstead for the time being "should provide and give to everyone, rich and poor, great and small, young and old persons, inhabiting this parish, upon every Good Friday yearly for ever, one halfpenny loaf of wheaten bread."‡ Whilst at Kidderminster an annual sum of 40s. was distributed in *farthing* loaves.§

Some Doles have been allowed to be scrambled for, but perhaps the most indiscriminate of all distributions was that at Bulkeley, in Cheshire, where "the Overseer had the money changed into pence and half-pence, and placed in a peck measure, inviting all the poor to take a handful; which was done. Those who came last of course got none."‖ There was also the shameful scene at Prince's Risborough, in Buckinghamshire, where, at six o'clock every Christmas morning, a bull, a boar, a sack of wheat, and a sack of malt were given to the poor. The practice whilst it lasted is reported to have produced "much intoxication and riot. The poor are said to have paraded the town during the whole night preceding the distribution, with an incessant clamour, effectually banishing all repose. On the following

* Cited in Hansard ccv. 1507.
† Charity Inquiry Commissioners' Ninth Report. p. 573.
‡ Twelfth Report, p. 147. § Twenty-fifth Report, p. 538.
‖ Thirty-first Report, p. 587.

morning they marched in crowds to Mr. Grubb's house; and these assemblies often comprised many strangers from a distance, as well as parishioners. On the doors being opened, they rushed to the feast prepared for them with so little decorum and forbearance, that often in their zeal for priority they inflicted wounds on one another with their knives. The whole of the remaining portion of Christmas Day is also stated to have been spent by many of them in public-houses."*

The abstract picture which we have thus drawn is abundantly corroborated by the authoritative testimony of experience.

The Poor Law Inquiry Commission of 1833 reported thus: —"As to the administration and effect of those Charities which are distributed among the classes who are also receivers of the poor's rate, much evidence is scattered throughout our appendix, and it has forced on us the conviction that, as now administered, such charities are often wasted, and often mischievous. In many instances, being distributed on the same principle as the rates of the worst managed parishes, they are less pernicious than the abuse in the application of the poor rates only because they are visibly limited in amount. In some cases they have a quality of evil peculiar to themselves. The majority of them are distributed among the poor inhabitants of particular parishes or towns. The places intended to be favoured by large charities attract, therefore, an undue proportion of the poorer classes, who, in the hope of trifling benefits to be obtained without labour, often linger on in spots most unfavourable to the exercise of their industry. Poverty is thus not only collected, but created, in the very neighbourhood whence the benevolent founders manifestly expected to make it disappear."† And one of the Commissioners describes their experience thus:—"We met with charitable foundations everywhere in old urban districts; and everywhere found their operation and tendency to be to create the misery they were intended to relieve, whilst they did

* Twenty-sixth Report, p. 107. † First Report, p. 204.

not relieve all the misery they created. . . . In Spitalfields they created a population born in charity, nursed in charity, fed in charity its life long, doctored in charity, and, after a wretched life, buried in charity."* Whilst another expressed himself convinced that "any trustee of a public charity for the distribution of Doles who, instead of distributing the substance as intended, consumed it in good cheer for himself and his friends—and any trustee of a charity for foundlings who, instead of applying the substance to those purposes, kept a mistress with it—really produced less immorality, ... and was *pro tanto* a benefactor to the public."†

The last of Lord Brougham's Charity Inquiry Commissions reported similarly:—"We have frequently had occasion in our reports to make remarks on the indiscriminate distribution of charities in sums too small to confer any real benefit, and without any care in the selection of proper objects. . . . It would be of great advantage if there were some competent authority to direct the application of charities of this description to purposes of education, or of some other substantial benefit to the poor."‡

A generation afterwards, the Duke of Newcastle's Commission on Popular Education reported that,§ "By crowding into the favoured neighbourhoods the poor raise house rent and the price of lodgings on themselves so as in great measure to nullify the relief which the charity affords." And the Schools Inquiry Commission reported in 1868 || that, "In far the larger number of cases Doles, in money or kind—and particularly in towns, where they often are of large aggregate amount—encourage pauperism, attract an idle and helpless population, and do no good whatever." Whilst our modern Charity Commissioners say, "Doles produce ultimately more poverty and misery than they relieve. The true way of giving relief is by helping the poor to help

* *Journal of the Society of Arts*, xvii. 686. The evidence of Mr. Stone, the Rector of Spitalfields, will be found in the Report of 1833.

† *Edinburgh Review LXIII.* 495.

‡ Report, Vol. xxxii., pt. I., page 5.

§ Report I., 517.

|| Report I., 216.

themselves; by endeavouring to give them health and strength of body, intelligence and cultivation of mind, and habits of thrift, foresight, and self-respect." *

Among the most striking individual instances of the evil working of Doles may be cited those of Bedford, Lichfield, and Canterbury. At Bedford a Charity was founded in the reign of Edward VI., and endowed with £40 a year, which in 1853 had risen to £12,000 a year. Its working has recently been reformed; but in 1833 a Bedford clergyman reported to the Poor Law Inquiry Commission,† that "There are very few labouring men in my parish who save anything. The great Bedford Charity has a bad effect on the minds of all the working classes. They are discontented because they think that there is an ample provision for the poor whenever they are thrown out of work. I have heard an engineer resident in the town say, that he dare not employ a Bedford hand, they are so idle. A stranger has lately contracted to light the town with gas. He declared that of all the places where he had undertaken such works he never met with such an idle set as the Bedford men. Thus they show by their actions that the charity is no real blessing to them. But the class above the working people are also affected by this charity to their injury. They conceive they shall be provided for in the almshouses if ever they come to poverty, and they are not careful and provident, but rather extravagant, in their way of living. In times of popular excitement the poorer sort will speak out, and say the paupers' charity should be theirs, and if they had justice done them they need not work at all." In 1868 Bedford had a population of 15,000, whilst out of its Charity income no less a share than £3035 was spent on marriage portions, apprentice-fees, almshouses, and doles. The doles were voted by the town itself to be injurious; whilst the marriage portion and apprentice Charities were reported by the Schools' Inquiry Commission as being, "at the best, a waste of money, and probably worse." ‡ The Charity income, their Assistant Commissioner reported,§

* Parl. Papers, 1867-8., xxi. 20.
† First Report (1834) p. 28.
‡ Report I., 530.
§ I., 531.

"colours and determines the whole life of many in Bedford. It bribes the father to marry for the sake of his wife's small portion; it takes the child from infancy, and educates him in a set form; settles the course of his life by an apprentice-fee; pauperises him by doles; and takes away a chief object of industry by the prospect of an almshouse."

At Lichfield, where the Inspector found upwards of £800 a year distributed in Doles, he reports:—"The charities have turned half the inhabitants of Lichfield into beggars; hence idleness, drunkenness, poaching, and thieving. It is impossible to exaggerate the evils they produce. . . . I have received testimony from some of the most intelligent inhabitants, who take the greatest interest in the welfare of the poor, that the charities produce a vast amount of beggary, idleness, lying, and profligacy, and destroy the feelings of self-respect and independence, and thus are great instruments of demoralisation in Lichfield."* At Canterbury the Inspector found a population of 18,000, a Dole income of about £2000, and a total charity income of £9100. He reports† that, for the Doles, "the candidates, successful and unsuccessful, may amount to 1000, representing [households with] a population of four or five times that amount. They are almost all women. They could earn the money over and over again while canvassing for it. . . . . A wine merchant said that on the day of the distribution of the 10s. gifts, he received seventy sums of 10s. over the counter."‡ On one occasion the circumstances of four hundred recipients of these 10s. gifts were investigated, and one hundred and forty-five of them proved to be undeserving of the money, either as being of bad character, or as being comfortably off.§

In 1579 Richard Watts created by his will a charity at Rochester, to provide a house "with six several rooms with chimneys, and six good mattrasses or flock beds and other

* Parl. Papers, 1868-9, xxi., 54. † Parl. Papers, 1871, xvi. 21.

‡ "There is a *London* parish in which every year £200 is given away in shillings and eighteenpences; and on the days when the distribution is made, the gin-palaces in the neighbourhood hire additional waiters to sell the gin which is called for by the recipients of the money." (Hansard, clxix. 182.)

§ Report of Popular Education Commission, VI. 517

sufficient furniture, to lodge poor travellers or wayfaring men, being no common rogues or proctors."* They were to lodge a single night, and to receive fourpence in the morning to help them on their way. Charles Dickens has thrown a halo of Christmas romance around them in his "Seven Poor Travellers." But the mayor and corporation of Rochester reported in 1869 that "having for many years seen, and being well acquainted with the operations of this charity, they are satisfied that harm instead of good would be fostered and encouraged by its extension, and that the persons who have resorted to the house are generally of the lowest and worst description."†

To purposes thus productive of evil an enormous amount of property is nevertheless still devoted. The income from endowments which is now distributable amongst the poor of England and Wales in small gifts of money or kind amounts to £383,029 per annum, independently of the £552,119 which is spent in almshouses and pensions.‡ In many districts the proportion of recipients to the total population is so high as to show that the Dole has produced an extraordinarily large number either of persons in want, or of persons who are willing to accept unearned money even when they do not want it. Thus a Charity Inspector reported, in 1860, that at Whittlesey, in Cambridgeshire, he found 1603 doles, of 2s. 2¾d. each; and at Fulbourne, in the same county, he found a charity income of £409, of which £129 was given indiscriminately in clothes, £155 indiscriminately in bread, and £60 was given to the poor who attended the parish church.§ Elsewhere, in a parish of 1150 persons, an endowment of £800 a year was devoted to Doles.‖

Generally admitted as is the evil of Doles by all competent observers, the Charity Commissioners find, neverthe-

* "Proctors" were persons sent out to solicit alms on behalf of others. By an Act of 39 Eliz. they were enacted to be rogues and vagabonds.

† Parl. Papers, 1870, xxvii., 21.

‡ *General Digest of Endowed Charities.* Parl. Papers, 1877. xxvi. 16.

§ Report of Pop. Educ. Commission VI. 513.

‖ *Ibid.* vi. 331.

less, that new "bequests to establish them are still not unfrequent."* A hundred men can see the pleasure which a beggar derives from the gift of sixpence, for one who has the patience to think out the probable influence of the sixpence upon the beggar and his neighbours.

On the other hand, some of the old Doles have recently been brought to an end under the Endowed Schools Act,† which authorised the Commissioners, by the consent of the Trustees of the Charity, to transfer them from purposes of pauperisation to those of education—though not permitting any other modification of them.

Closely akin in character and effect to Doles are Charities for general gratuitous education—the indiscriminate distribution of mental, instead of tangible alms. Apart from any considerations of the remoter evil of artificially multiplying the clerk class to the diminution of the artisan class, the immediate effects of such Charities are injurious. The school is flooded with children whose parents attach no value to education, and afford the master no aid. As no fees are paid for attendance, neither parent nor master feels an interest in enforcing it. Other children, again, are kept uneducated by their parents, in hopes of their being admitted to this free school—a hope often ultimately disappointed. And if the district be thinly populated the school actually keeps down the level of instruction, by preventing the establishment of some more efficient private school. Hence the Endowed Schools Commissioners say, "There is no point connected with schools on which the testimony of experienced persons is more uniform or emphatic than the ill effects of gratuitous education independent of merit." The Schools' Inquiry Commissioners found hardly any instances where it seemed to work well; and report that, "Indiscriminate gratuitous instruction has been demonstrated to be as invariably mischievous as indiscriminate almsgiving; and a desire to retain the one must be ascribed to the same inconsiderate benevolence as that which keeps up the other. On this

* Parl. Papers, 1876, xx. 23.

† *Infra*, Part V.

point there is an extraordinary concurrence in the opinions expressed by the weightiest authorities."*

The evil becomes of course still greater in the case of schools which gratuitously provide food or clothing for the children. Such assistance is of the utmost value in the case of orphans who have lost their bread-winning parents; and even in the case of other children it is often desirable, if it be afforded to only a partial extent. But to relieve a father altogether of the duty of maintaining a child is seldom an unmixed gain to him, and is usually a serious moral loss to it.

In the case of Foundling Hospitals these evils are aggravated by others still greater. If the Hospital, like that in London, be small in proportion to the population who look to it, and be most carefully administered, it may do good. But if it be not, its existence stimulates unchastity, as the Continental returns of illegitimacy serve to show; whilst instead of saving infantine life, its ultimate result is to multiply infantine deaths. For whilst the rate of mortality is higher amongst the children whom it receives than if they had been left to a mother's care, the children whom it cannot receive have been multiplied on the chance of its receiving them, and cases of infanticide increase accordingly. As in the case of Doles, the expectation of benefiting by the Charity influences the conduct of far more persons than can actually obtain the benefit. The Dole creates more paupers, the Hospital more foundlings, than its resources can relieve.

Even more injurious than Doles, unless administered with the greatest care, are Charities for providing Marriage Portions; like Mr. Raine's Foundation, which has been at work for a century and a-half, providing an annual marriage portion of £100 for a girl marrying in Wapping or Shadwell. Too often they operate only as a bribe to hasty and improvident marriages, and cases are not wanting in which an adventurer has sought out a bride for the sake of the portion, and has deserted her immediately on receiving the money. Sometimes the portion is even mortgaged

* Report I., 593.

before marriage.* In 1846 it was found that of 1400 marriages which took place at Rome, 800 were endowed by charitable Foundations; the dowry being often won by means that did little credit to either the patron or the favoured bride.†

Less productive of injury indeed than Doles, but still less productive of benefit, are Charities for paying apprentices' premiums. The annual amount applicable for this purpose exclusively was estimated by Mr. Hare‡ in 1857 at £31,670, whilst a further income of £69,200 was applicable to it amongst other objects. Mr. Cumin, in 1860, estimated that £50,000 a year of Charity revenue was actually spent on premiums for apprentices.§ Yet the practice of going through apprenticeship "has almost ceased to exist in our greatest seats of industry,"‖ now that the introduction of machinery has simplified so many processes, and the minute subdivision of labour has made each individual's share of his craft too small to take long to learn. Moreover even in trades where apprentices are still taken, there is little need to pay a premium. The custom by which apprentices lived in their master's family has died out in the more luxurious and more exclusive social life of the present century, and they consequently are no longer a necessary source of outlay to him. This may add to the moral dangers of an apprenticeship, but it diminishes its cost; for if a boy is well educated a master will take him without any premium at all. It is found that a well administered Poor Law Union has nothing to pay on apprenticing a boy; though a badly administered one is compelled to pay premiums before it can induce masters to hamper themselves with boys from its workhouse.¶ In 1830 a Society was established "for apprenticing children of Dissenting ministers." It still

* See the Irish Commissioners upon the case of Roger Palmer's gift for Marriage Portions, at Rush, Co. Dublin; Parl. Papers, 1877, xxvi., 30. Also Third Report of (English) Inquiry Commissioners, p. 317.

† Report of Mortmain Committee, 1851. Evidence of the Rev. Father Mahony, Q. 2977.

‡ *Essays upon Educational Subjects*, p. 289.

§ Report of Popular Education Commission, iv., 318.

‖ Ibid. I., 532. ¶ Ibid. IV., 319.

exists, but its original purpose has become so obsolete that it is now contemplating a change of name.

Still more generally useless are endowments for providing Loans. Apparently they offer advantages to enterprising young men to advance themselves in business, but in practice these advantages appear to be declined; possibly because a young man of known enterprise can usually obtain private credit, and prefers it to the patronage and the scrutiny of a Board of Trustees. Hence if the loans are borrowed at all, it is usually for the sake of putting the money into some quiet investment and enjoying the difference between the two rates of interest. The Charity perhaps asks one per cent. for a long loan, and a bank with a colonial connection will give five. Little enterprise is needed to make a practical application of these truths. If care is taken to prevent such an abuse of the funds, they simply lie unapplied for. Thus at Coventry, the Commissioners found in 1856 a loan fund of £20,000 wholly unemployed, and accumulating by its annual interest.* Similarly at Warwick, Sir Thomas White's charity for starting young tradesmen in business, had, in 1869, £7000 out upon loan, but it had also £20,000 for which it could not find suitable borrowers, and which lay absolutely useless yet accumulating.†

The value of Almshouses, again, is involved in considerable doubt. There is much that is attractive in the idea of affording the aged the means of quiet rest between the toil of life and its end. But this object can be effected with greater benefit and less evil by providing pensions free from any obligation of residence. Pensions are distributed with far less trouble than is involved in regulating the affairs, and checking the disorders of an almshouse. Pensions involve no building capital and no annual outlay in repairs. The pensioner can live with those who know and care for him; instead of having to quit their society for that of strangers, at the very period when he needs it most. Even the Greenwich sailors prefer receiving a small daily allow-

* Parl. Papers, 1856, xxii., 220. † Hansard, cxcvi., 1777.

ance, living with their friends, to dwelling in their palatial hospital.* And whilst thus more economical and more acceptable than an almshouse, pensions are free from its great drawback—its obviousness, which reminds every passer-by of his chance of getting himself provided for by charity. The pension does its perilous good in secret; the almshouse obtrudes itself upon the eye, "a visible invitation to improvidence." Unhappily this very obviousness has incited the multiplication of almshouses, affording as they do so much ampler gratification to the vanity of a Founder than the silent beneficence of a pension.

The most beneficial almshouses are probably those which fall below, instead of rising above, the habitual standard of comfort of their inmates; which do not, like ordinary almshouses, give to the period of idleness what the period of work never succeeded in obtaining, but serve only to arrest a social descent, and afford a refuge to persons who have seen better days. At the same time such institutions are peculiarly open to jobbery. Thus at Sandwich, besides a set of almshouses for the working classes, there is another where the inmates receive £40 a year and a house; and its patronage, until the Municipal Reform Act, was in the hands of the Mayor. The consequence was that the mayoralty was sought for the purpose of making family provisions by means of the Foundation.† I learn from local inquiry that one Mayor presented his young wife to an almshouse and pension, which she enjoyed for forty years afterwards.

II.—Subject Matter of Gift.

Arrêtez la Mainmorte s'il est possible.
—*Esprit des Lois*, xxv. 5.

The only restriction which is likely to be proposed under this head, is the prohibition of charitable gifts whose subject matter consists of land. The mediæval enactments which prevented the gift of land to corporations partook of this

* Hansard, cxci., 1286. Cf. Mortmain Report of 1851, p. 434.
† Report of Popular Education Commission, VI., 522.

character; but they were not limited to eleemosynary corporations, and they did not extend to charitable gifts to unincorporated recipients. The history of English law affords, however, in the eighteenth century, a perfect and more recent example of such a Restriction.

When the Reformation broke up the unity of mediæval life, reduced the Church to purely ecclesiastical functions, and released her shorn revenues from their general eleemosynary obligations, it gave a challenge to the nation, which the nation eagerly accepted. The new division of labour was readily undertaken by the lofty public feeling of the age; and lay foundations arose all over the country to discharge, each in its special way, the various particular services of physical or moral beneficence, which in simpler times had seemed the common homogeneous task of the national clergy. The grammar schools of more than three hundred towns—one-half of the grammar schools in England—are monuments of the tide of charity that welled up in the century of Edward and Elizabeth. The movement left a definite impress on our statute book. The Act of 1597 (39 Eliz., c. 5) provided new facilities for the creation of charitable endowments, as did that of 1601 (43 Eliz., c. 4) for their future supervision and correction; and the enumeration which the latter statute gives of their possible objects is quoted to this day by our Tribunals as the legal definition of charity. The favour which the legislature thus manifested towards public foundations influenced, of course, the policy of the law courts, and even now, side by side with the incompatible maxims of a later and conflicting policy, the plea which then arose is still at times heard, that "Charities are favoured by the law."

This attitude was maintained by English lawyers and lawmakers for a century and a half, the golden age of endowments. Another revolution came. The days of Bolingbroke succeeded the days of Bacon. The England which had fought the Church to save religion, now fought religion to destroy the Church. It is a remarkable, if not a humiliating fact, that in the present times of wise devotion and devout

benevolence, the rules of law, the policy of courts, and the current of public opinion, on the subject of Charitable Endowments, are still determined by an enactment of that age of narrow views and crooked aims, when the high wisdom of Bacon, Hooker, and Milton had ceased to inspire, and the honest common sense of Hume, Smith, and Bentham had not yet begun to direct. Our jurisprudence has learned its theory of public benevolence from the Parliament of Hervey and Walpole and Bolingbroke, its estimate of pious uses from the readers of Toland, Tindal, and Mandeville.

The spirit of that time, with its reaction against ecclesiastical tradition, is doubly manifest, for good or evil, in the legislation of 1736. The same session which saw the laws against witchcraft repealed, saw a statute passed to check charitable donations.

Before the passing of this Act a gift of either real or personal property might be made for "charitable uses;" and might even be made to them in perpetuity, although a gift in perpetuity for any other uses was and is void by the general rules of English law. The only restriction was, that if the property was real, and was to be held for charitable uses not by private trustees but by a corporation, whether aggregate or sole, the licence of the Crown was necessary. Such licences the Crown had, by 7 & 8 Wm. III. c. 37, been expressly empowered to grant, as a means of dispensing with the prohibitions of the old Statutes of Mortmain against the accumulation of real estate in the hands of incorporated bodies. But the Act of 1736 imposed far more sweeping restrictions.

This statute (9 Geo. II., c. 36) presents one of the most curious problems in juridical history. Its object is a mystery; its very titles are misnomers. It is called the Mortmain Act, but it is not concerned with Mortmain.* It is called Lord Hardwicke's Act, but he was not concerned in its introduction. Antiquarian jurists have abandoned, as an insoluble riddle, the attempt to discover the causes of its

* "The reasoning producing this Act," says Lord Hardwicke, "is more like De Donis than Mortmain" (1 Ves. Sen. 223). For it aims at rendering land alienable, not at protecting the feudal rights of the lords of the land.

enactment. Its preamble is at variance with its provisions, and its provisions with the professions of its promoters.

The effect of this statute is to prevent landed property from being given to charity either by Will or by such a deed as is practically a Will in disguise. Secret deeds, revocable deeds, death bed deeds, it renders void. In other words, it provides that land, or money for the purchase of land, is not to be given to charitable uses except by means of an absolute and irrevocable conveyance, executed at least a year before the death of the donor, and publicly enrolled within half a year of its execution.

The novelty of these provisions is as remarkable as their stringency. They constitute a revolution in legal policy, and mark an epoch in the moral and spiritual life of England.

To what contemporaneous circumstances are we to look for the justification or even the suggestion of so important and so revolutionary an enactment?

The Mortmain Committee of 1844 report that in spite of all their efforts they "failed to arrive at any certain knowledge of the true grounds on which the Act of Geo. II. was passed. Indeed, the insufficiency of the reasons assigned in the reported debates is such as would rather lead to the inference that some apprehensions, which it was not thought wise to make public, must have operated in addition to the avowed motives of the legislature." Mr. Burge, Q.C., one of the Committee's most learned witnesses, told them "I should be exceedingly puzzled to state the origin of the Act. I have endeavoured to ascertain it by research, but without success. I am strongly inclined to think that there is a great deal more than meets the eye in reading the history of that time. When I compare the enactments of the Act with its title and preamble, I suspect there must have been some local and partial purpose to be answered. . . . . It is clear, we have not arrived at the real motive of the legislature by anything which is professed in the title or preamble, or which one can collect in the history of the times. . . . . I recollect once inquiring of Mr. Wright, the great promoter of the Parliamentary History, who published the Cavendish

Debates, and was an exceedingly clever man, and most indefatigable in his study of the history of the proceedings of Parliament; he could give me no information about it, nor does any contemporaneous historian that I have met with; all that can be found is in a note to Hansard's Parliamentary History." (Questions, 1381).

If we may credit that note, the Act was produced partly by some recent injudicious and ostentatious devises to charities, but particularly by the fact that one Mr. Michel was going to leave a very large estate in land to one of the Universities; the allusion being, no doubt, to John Michel's foundation at Queen's College, Oxford (to which he had just devised estates in Kent and Berkshire, by which the Grand Front in the High-street was erected, and a new staff of Fellows, Scholars, and Exhibitioners established, whose stipends amounted in 1852 to £1380 a year).* We may well ask why the munificence of Michel should have goaded the House of Commons into such impetuous action, when the munificence of Radcliffe, twenty years before, had awakened only admiration. If the aggrandisement of the Universities had been the danger immediately dreaded, is it credible that their petition would have been acceded to, and Oxford and Cambridge have been, as they are, exempted from the Act? The story assumes that a sweeping measure was passed to meet a single case, and that this very case was then exempted from the measure.

It must not, however, be forgotten that while the petitions of the Universities and public schools† were granted, the

* *Oxford Univ. Com.* Report, (Parl. Papers, 1852, xxii.) p. 204.

† Harris mentions the petitions of the schools in his Life of Hardwicke, but the Parliamentary History does not. The Cambridge petition contains some curious statistics. The University declare: "That a considerable part of their revenue arose from annuities and certain other payments issuing out of lands and other estates; and that many of those payments having been fixed in the reign of Queen Elizabeth, and still continuing invariably the same, were then, by the great fall of money since that time, sunk so far below their original value as to be insufficient to answer the purposes for which they are designed, and that several headships were under £120, some under £100 per annum, and that the salaries of some professorships were under £50 per annum, and others, as those of botany, anatomy, and Christianity, had no endowment at all; and that the income of much the greatest part of their fellowships was under

petitions of the Grey Coat Hospital, and other charity schools, for a similar exemption were in every case refused, though their claims might well have been considered more pressing and more unexceptionable. This anomalous preference of the charities of the rich to the charities of the poor seems at first sight inexplicable. But when the Bill was under discussion, London had not ceased to talk of Guy's unprecedented gift of two hundred and thirty-eight thousand pounds, for the hospital that still bears his name; or ceased to invent the stories about his disinherited kinsfolk, which drove the Governors in self-defence to print his will with its long array of family bequests. Unmistakeable are the sneers of the debaters upon the Bill, at "the spirit which has been lately raised for erecting and endowing hospitals," and at "the delirious ambition of erecting a palace for beggars and having a name engraved in gilded letters above a superb portico, or having a statue set up in the area of a charitable palace."

But to project and to carry so strong a measure, stronger feelings must have been at work than the thought of either Michel's or Guy's lavish munificence could ever have aroused. A political panic can scarcely have been awakened by the thought of a hospital or a college. The Jacobites, the clergy, the Dissenters, were more likely sources of terror. Moreover, if a mere jealousy of mortmain in general were the motive, why should Scotland have been excepted from the Act? It must be remembered that the year of this enactment is chiefly made conspicuous in our annals by the unsuccessful effort of the Nonconformists to free themselves from the shackles of the Tests Act. An epoch in the ecclesiastical history of England had arrived. The

sixty, of many under forty, of some so low as thirty, and twenty and fifteen pounds per annum; and that many of their scholarships and exhibitions amounted not to above six, four, and three pounds per annum; and that some were even under those small sums; and that many poor students had neither scholarships nor exhibition to help towards their maintenance, and that the number of advowsons in most colleges was very small in proportion to the number of fellows, and they therefore prayed the House to except that University, and the several colleges therein, out of the said bill."—*Parliamentary History*, vol. ix., p. 1110.

original provisional Nonconformity, which looked to ultimate absorption in a more comprehensive national church, had begun to give place to a newer school, which repudiated as irreligious the very principle of Establishment,* and aimed at the legalisation of a permanent "Dissenting Interest."

Remembering this, and remembering that Mr. Coward's scheme for a dissenting endowment had just been planned (a most important addition to the existing foundations of Lady Hewley and Dr. Williams), it is possible that some anticipated danger from the schismatic side contributed, if not to the introduction of the Bill, at least to the largeness of the majorities by which it passed. If so, Lord Hardwicke had an important purpose in the transient references which the notes of his intended speech contain to 'faction,' 'dissenters,' and 'a separate and disjointed set of people like the Jews.'

The opponents of the Quakers' Tithes Bill and of the abolition of Tests may or may not have looked to the Mortmain Bill as a barrier against the material organisation of Dissent. But it is, at any rate, certain that their opposition to the former measures contributed materially to the passing of the latter. Upon all three the Bishops were unanimous in opposition; and the resolute attitude they assumed seems to have aroused corresponding energy in the supporters of the three measures; so that, as Lord Hervey† has it, "Parliament, like bulldogs, sticking close to any hold on which they have once fastened, the poor church this winter was as much worried as Sir Robert had been any other." Walpole, whom the recollections of Sacheverell's triumph had alarmed into opposing the repeal of the Tests, came to the support of the Quakers' and the Mortmain Bills; though not daring to take any prominent part in pushing them on. ‡ Lord Hardwicke and Lord Talbot (then Chancellor) found technical objections to the proposed mode of relieving the Quakers; but they 'espoused and pushed' the

* Bogue and Bennett, III. 169.

† *Memoirs* II. 87.

‡ Ib. II. 94.

Mortmain Bill, as 'all the lawyers in both Houses' had done —a professional coalition which Lord Hervey, with amusing malice, attributes to their belief that "the fewer lands there were unalienable in the kingdom, the more titles to lands there would be open to be litigated."

Some evidence of the popular feeling on the question may be gathered from Fielding's burlesque of *Pasquin*, which appeared this year, and was running with extraordinary success when the Bill was passing through Parliament. Firebrand, the Priest of the Sun, rebels against Queen Commonsense, and declares that he does so—

> "Not for ambition's earthly cause,
> But to enlarge the worship of the Sun;
> To give his priests a just degree of power,
> *And more than half the profits of the land.*
> *Oh! my good Lord of Law, would'st thou assist,*
> *In spite of Commonsense it might be done.*"

It was by Sir Joseph Jekyll, the Master of the Rolls, "foremost amongst the philanthropists of his day,"* Pope's

> 'Odd old Whig
> Who never changed his principles or wig,'

that the Mortmain Bill was introduced into the House of Commons. In that House he had, according to Lord Hervey, more general weight than any other single man. There is no ground for supposing that Hardwicke had any hand in its composition. The opponents of the Bill invited his alliance; and he introduced an amendment into it when it was before the Lords (the clause which makes *purchases* by charities hold good, even if the vendor die within the year; which he introduced chiefly to enable Queen Anne's Bounty to continue buying land to augment vicarages.)†

The aim of the Bill was defined by its title as being "To restrain the dispositions of lands, whereby the same become unalienable," and it recited that gifts "in mortmain are prohibited by or restrained by Magna Charta and divers other wholesome laws as prejudicial to and against the common utility; nevertheless this public mischief has of late

* Ewald's *Walpole*, p. 272. † 1 Vcs. Sen. 222.

greatly increased." An Act of 1695 (7 and 8 Wm. III., c. 37), had extended the royal power of granting licences in mortmain; and so largely had its provisions been acted upon that when the Commons in this session addressed the Crown for a return of these licences, it appeared that in the forty-one years lands of the annual value of £52,000 had gone into mortmain by royal licence,* independently of all that had been acquired under statutory permission. Yet the opponents of mortmain made no effort in their Bill to remove or restrain this dispensing power. They left corporations free to enlarge their estates by purchase; and contented themselves with restricting the power of benevolent founders to present lands to charities, restricting it alike whether the lands were to pass into mortmain, that is, into the hands of a corporation, or only into those of unincorporated private trustees. It is remarkable, too, that their absolute prohibition of charitable gifts of land extends only to gifts by will; the benevolent being left free to "prejudice the common utility" by the most lavish gifts of land, so long as they did it a year before they died. "Languishing and dying persons," to use a phrase of the Act, were evidently the donors whom it had in view, with their accessibility to sacerdotal influence;† and yet all the speakers in the debate admitted that the modern English clergy were entirely free from any suspicion of even attempting to influence sick men in the distribution of their property.‡ Great weight is due to such a concession made at a time when anti-clerical feeling ran so high. For "the Mortmain

* Gentleman's Magazine, 1736, p, 393.

† In *Att.-Gen.* v. *Lord Weymouth* (Ambl. 23), Lord Hardwicke says, "The reason of this statute was to hinder gifts by dying persons, out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls to give their lands to charities which they paid no regard to in their lifetime." And he is quoted (but I have not succeeded in verifying the quotation) as saying in *Att.-Gen.* v. *Graves*, "One of my chief reasons for laying a restraint on such donations, is lest the clergy of our Established Church should be tempted and instructed to watch the last moments of dying persons as insidiously as ever the monks and friars did in the darkest times of Popery and superstition."

‡ Gentleman's Magazine, 1736, p. 336. But on their rubrical obligation to do so, see below, Part III. sec. vi.

Bill," says Lord Hervey*, "and the Quakers' Bill were both passed in the House of Commons by great majorities, and everybody that spoke for them gave the bishops and the parsons very hard as well as very popular slaps; the young men all ran riot on these topics, and there were none to take the part of the poor Church but a few old Tories and Jacobites."

In the House of Lords this feeling found a concrete foe to assail. Since the suspension of Convocation had deprived the Established Church of any central organisation, the Corporation of Queen Anne's Bounty had assumed an importance, as her extra-constitutional organ, such as it is difficult for Churchmen of the present century to realise. It was a metropolitan body, thoroughly devoted to the Church, and possessed of great wealth, great powers, and great privileges. Dean Prideaux, himself one of the Governors of the Bounty, had pointed to it as the means of buying back the secularised tithes, and undoing Henry VIII.'s spoliations.† A writer, whose calculations were in the hands of every man of business, had warned the laity of this, and had reminded them of the dangerous fecundity of compound interest.‡ Anne had released the Governors § from the old restrictions on mortmain, and in the thirty years of their existence they had spent between seven and eight hundred thousand pounds in buying land.‖ They naturally petitioned for a similar exemption from the restrictions of the new Bill. It is a significant fact that whilst similar petitions from the Universities were referred to the Committee, and a clause exempting Oxford, Cambridge, Eton, Westminster, and Winchester was carried by 227 to 130, the House, by 143 votes to 95, refused to refer the Governors' petition. (The

* II. 94.

† "Vindication of an Award of Chas. I.," p. 64. He enforces the suggestion by an assurance that the creation of the Bounty had been "a very powerful means to obtain for us from God" Marlborough's victory at Ramillies (p. 65).

‡ Smart, *Tables of Interest*, p. 107.

§ 2 & 3 Anne, c. 11, s. 4.

‖ Gent. Mag., 1736, p. 393. Under one Will—that of a Mr. Osbolston—the Bounty had already received a residuary bequest of nearly £13,000. Ecton's *Proceedings*, pp. 19 and 117.

Bill itself passed the House by 176 to 72.) Even in the Universities, a precaution was taken against the consolidation of clerical power; the fifth clause of the Bill providing that no college should hold more advowsons than would amount to half the number of its Fellows—a remarkable attempt to prevent lay patronage from passing into ecclesiastical hands, which was repealed seventy years afterwards, in order to secure "a better supply of fit and competent parochial ministers." (45 Geo. III. c. 101.)

When the Bill reached the Lords, the Governors had to meet a direct attack. The Bishops moved to exempt Queen Anne's Bounty from the Bill. This called up Lord Hervey, who entered into an elaborate analysis of the receipts and expenditure of the Bounty, insisted that the Governors were perverting it from its objects, and taunted the Bishops with robbing the public under pretence of helping the poorer clergy, and then cheating the poor clergy by giving the proceeds to the rich ones.* (There may have been some foundation for his attack, for next year the House of Lords addressed the Crown upon the subject, and the rules of the Bounty were revised.) He succeeded in preventing the exemption; but long afterwards, in 1803, an Act was passed (43 Geo. III. c. 107) to release the Bounty from this statute of 1736, as one by which "the beneficial effect and operation" of Queen Anne's gift "had been considerably obstructed and retarded."†

Lord Hardwicke found the principle of the Bill so popular in the Upper House that the second reading passed without a debate, and he never delivered the elaborate speech which he had prepared.‡ He would have warned the lay lords that

* Hervey's *Memoirs II.*, 95, 101.

† It may be interesting to contrast the present financial position of this Corporation with the anticipations of that period. According to a Return of 1877 (Parl. Papers LXVI. 665), the assets of the Governors of Queen Anne's Bounty in 1876, a hundred and forty years after the passing of Jekyll's Act, amounted to £3,777,976 10s.; their annual expenditure to £119,806 5s. 9d.; and their annual receipts to £146,981 0s. 5d.; of which the First Fruits produced about £5000, and the Tenths about £10,000 annually. In January, 1879, the assets amounted to £3,845,556 16s. 4d.

‡ His notes for it are printed in Harris's *Life of Hardwicke*, I. 308.

the balance of power had been disturbed ever since their ancestors, by permitting their entailed lands to be alienable, had parted with a great share of their influence in the country, whilst, by the inalienability of mortmain, the influence of another estate of the realm was "going on perpetually increasing." He would have asked them whether "everybody was to be suffered to alter the balance of power and property at his pleasure?" He would have warned the lords spiritual to consider the security of their "eminent, well-endowed dignities," and "fortify the enjoyment of what they have" by refusing to receive more; lest their wealth should reach a pitch that would tempt some enterprising prince to repeat the spoliation of Henry VIII.'s time.

Thus Sir Joseph Jekyll's Bill became law, the very facility with which it passed through Parliament affording sufficient evidence of the absence of that charitable enthusiasm whose violence alone could have justified its being passed. From its importance I subjoin in full the provisions of this remarkable measure.* Few statutes have produced more litigation; but this has been due rather to the zeal with which Englishmen have persevered in attempting to do works of benevolence, than to any obscurity in the wording of the Act. Its provisions nevertheless present much matter for criticism, independently of the doubtful principle upon which it is based. For even if we accept its general policy, we shall be at a loss to understand the halting manner in which it carries out that policy. Lands are to be kept from inalienability, children are to be saved from disinheritance, dying men are to be protected against ecclesiastical extortion. But why carry out each of these purposes only half way? The Act restrains the voluntary gift of lands, but leaves charities at liberty to bring them into mortmain by purchase. The Act forbids "the disherison of lawful heirs" by a testator, but leaves him at liberty to bequeath away in charity the personalty which serves as the inheritance of his younger children. The Act prevents "languishing or dying persons"

* *Infra*, p. 76.

who are landowners, from sacrificing their estates to their ghostly fears, but it leaves those fears free course in the minds of men who only own personalty, in the minds, therefore, of all the classes whose want of education renders them an easy prey to such terrors. In each case it averts the lesser danger and takes no heed of the greater.

Practical proof may easily be given that it is not for the land-owning classes that any such legal protection against death-bed influence is needed. An investigation of the long catalogue * of Irish charitable bequests for the years 1844 and 1845 will show that the great majority of those which were made to pay for masses were made by the poorer orders; as where Elizabeth Courtney, of Dublin, directs her featherbed to be sold, and ten shillings of the price to be spent in buying four masses.† Passing from religious anxiety to sacerdotal pressure, it may be noticed that the seven suspected wills which Archbishop Whately's son-in-law brought before the last Mortmain Committee were those of testators the average of whose personalty amounted only to £1309 apiece.‡

The list of the exceptions§ that Parliament has made to the working of the Act of Geo. II. completes the irony of this story of paradoxes. A gift to Oxford is said to have been one of the two chief events that provoked the Act; yet the Universities were excepted from its prohibitions. The foundation of a hospital is said to have been the other; yet several hospitals have since obtained exceptions. The one source of peril upon which stress was laid in the debates on the Act was Queen Anne's Bounty; yet Queen Anne's Bounty has since obtained an exception. To restrain the Church from acquiring more land was the one great object of the Act; yet the only sweeping general exception that has yet been made to its prohibitions is one which permits lands to be devised "to the Ecclesiastical Commissioners,"

* Parl. Papers, 1846, xlii., 69.

† P. 108.

‡ Report of Mortmain Committee, 1851. Parl. Papers, 1851, xvi., Appendix I.

§ See Tudor's *Law of Charitable Trusts*, I. 3, iv.

for "the endowment or augmentation of the income" of clergymen of the Established Church.*

The House of Lords' Committee on Spiritual Instruction recommended, in their Report of 1858,† "That the Mortmain Acts be so far relaxed as to admit bequests of impropriate tithe rent-charges, or of money for the purchase of the same, for the endowment of any benefice with the cure of souls, to an amount not exceeding £300 per annum."

The Act has been rendered more stringent than its framers intended, by the vigour with which the judges have carried it out. "Never," says Jarman, "was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature."‡ Mr. Lewis says that "the judges have given the widest possible scope to the operation of the Act, and have been even astute to discover arguments whereby cases seemingly *extra* both the letter and spirit of the statute might be brought within it."§ And Lord St. Leonards, whilst pointing out that "the tendency of modern decisions has been the other way," insists that in the older cases "it is impossible to deny that there is to be discovered an inclination to carry the provisions of the Act beyond the intention of the Legislature."‖ Lord Hardwicke initiated the principle of departing from the rule that charities are favoured, and of construing the Act widely, so as to cut down charitable gifts as far as possible; and his successors faithfully followed it into still greater latitude, until a reaction set in during the present generation. Three important and unfortunate instances of this construction may be noticed.

I. The Act was meant to apply only to gifts of "land, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments." But these words have been so interpreted as to include many securities that fall in no way within the economical or political princi-

* 6 & 7 Vic., c. 37, s. 22. See also 43 Geo. III., c. 108.
† P. xxi. ‡ *On Wills* I., 211.
§ *On Perpetuities*, p. 691.
‖ *Myers* v. *Perigal* (2 D. M. and G., 619). A.D. 1852.

ples on which the statute was founded, and that even to the eye of an ordinary lawyer would only wear the aspect of pure personalty, and in some cases have been declared to be personalty by the Acts creating them. Hence no valid devise to a charity can be made of a mortgage of turnpike tolls; although, as Sir Wm. Grant says, "It is difficult to show that a charity, by taking money upon that security, takes any interest in land,"* and even the Lord Chancellor who first decided the point admitted, "It is not at all within the mischief, *but the consequence would open a much larger field for charitable donations.*"† The same construction has been adopted in the case of loans secured upon local rates, and of shares in many public undertakings; with the result of establishing between bequeathable and unbequeathable securities a line of distinction, so artificial that it does not correlate with the policy of mortmain laws, and so intricate that no testator can safely act under it without skilled advice. The most recent text writer on this branch of law is compelled to leave this distinction with the remark that, "The decisions are at present somewhat conflicting."‡ So too a devise of growing crops, or of the money to arise from their sale, cannot be made to a charity; though no land can be rendered inalienable by such a gift. In a similar manner it has been settled that if a testator directs his estates to be sold, and the purchase money alone to be given to a charity, thus expressly providing that the land shall not go into mortmain, the gift of the purchase money will be void.§ The decision is said to be based on the ground that a legatee of purchase money may elect to take the land instead; but even then it would be difficult to reconcile it with the well-established rule that, even before the Naturalization Act of 1870, the purchase money to arise from the sale of land might be devised to an alien, though at that time the land itself could not be.‖ And, indeed, the bequest of pur-

* *Finch v. Squire* (10 Ves. 41).

† Lord Eldon; in *Knapp* v. *Williams* (4 Ves., 430 n.)

‡ Whiteford on Charities, p. 37.

§ *Att.-Gen.* v. *Lord Weymouth* (Ambl. 20).

‖ See *Du Hourmelin* v. *Sheldon* (4 M. & C., 525).

chase money to a charity has been set aside even where the circumstances were such that the legatee (and even the testator himself, for it was by a previous settlor that the conversion had been directed), could not have insisted upon taking the land as land.*

Similarly it has been ultimately settled that a man who has sold an estate cannot bequeath to a charity the unpaid purchase money, because the payment might be enforced against the land.†

These perplexing extensions of the Act have thrice been condemned after official investigation. The Mortmain Committee of 1844 reported,‡ that "land left to Charities, with a direction to be sold, and all virtually personal property, do not fairly come under the intent of that statute." The Mortmain Committee of 1852 reported,§ that "great evils arise from the somewhat technical distinctions in the law as they affect different kinds of personal estate. It is in evidence before your Committee, that scarcely any property can be safely disposed of, where legacies are given to Charities, and the property is considerable, without a suit in Chancery. As such a suit involves an investigation of the relative amounts of the different descriptions of property, the expense is necessarily large, and usually falls upon the residuary legatee, who has also to pay the charitable legacies themselves. Your Committee are of opinion that these distinctions should be abolished entirely, and that the same law should be enacted with respect to all descriptions of personal estate given for charitable purposes, and whether it be directed to be laid out in land or not." The Popular Education Commission of 1860 reported,‖ that "it seems reasonable, if the State desires to encourage educational Foundations, that the decisions which extend the prohibition of devises in mortmain to mortgage money, and to the price of land ordered by the Will to be sold, should be repealed."

* *Brook* v. *Badley* (L. R. 3 Ch. 674).

† *Harrison* v. *Harrison* (1 R. and M. 71), overruling *Middleton* v. *Spicer* (1 Br. C. C., 201).

‡ Parl. Papers, 1844, x., 509.

§ Parl. Papers, 1852, xiii., 7.

‖ Report I., 514.

II. The Act prohibits bequests of money "to be laid out or disposed of in the purchase of any lands." But this has been interpreted to apply not merely to cases where the testator has expressly directed that application of the money, but even to cases in which his intention is only inferred by a somewhat astute construction.* Even Lord Hardwicke allowed money to be bequeathed for "erecting" schools and almshouses, on the ground that to erect need only mean to found, and that a school or almshouse might well be founded in hired premises; but such bequests are now held to be void.† Lord Hardwicke also held that money might be bequeathed for the purpose of building upon land, which though not in mortmain before the testator's death might afterwards lawfully come into mortmain;‡ yet this was at one time denied on the simple ground that such a bequest "holds out a temptation to people to give the land,"§ but it is now a well-established rule. Still it has been settled that no bequest towards a purpose which will involve the use of land, can be allowed to take effect unless the testator distinctly points to land that is already in mortmain, or directs that no part of his legacy shall be spent in the purchase of land. ‖ Such a presumption of illegal intention may be regarded as anomalous.

It is needless to remark that many most beneficial charities have been prevented from coming into existence by the unforeseen difficulty that they would be held to involve the acquisition of land. A very recent instance occurred under the will of the philanthropist, George Moore, who had set apart £15,000 to establish a Convalescent Hospital, but died before the site was bought.¶

Lord Northington carried the construction of this clause so far as to treat the bequest of money for the improvement of lands already belonging to a charity, as being equivalent to a bequest for purchasing new lands for it; and declared

* *Cantwell* v. *Baker* (2 Ves. Sen. 185); *Vaughan* v. *Farrer* (2 Ves. Sen. 182).

† *Att.-Gen.* v. *Nash* (3 Br. C. C. 588).

‡ *Att.-Gen.* v. *Bowles* (8 Atk. 806). See now *Att.-Gen.* v. *Philpot* (6 H. L. C. 338).

§ Per Sir R. P. Arden, M.R., *Att.-Gen.* v. *Whitchurch* (3 Ves. 141).

‖ *Pratt* v *Harvey* (L. R. 12 Eq. 544). ¶ Smiles' *Life of Moore*, p. 443.

that if such bequests were allowed, "almshouses would be turned into palaces, and small spots of ground be covered with immense buildings."* This extreme position has, however, long been abandoned; but it is still law that money cannot be given to pay off the incumbrances upon lands that already belong to a charity.†

III. It was always the rule of Equity that if one claimant had two funds to resort to, whilst another claimant could resort to but one of them, the former might, if necessary, be compelled to leave the doubly burdened fund to the latter claimant, and satisfy himself from the other source. After the passing of the Act of 1736, this principle was consequently applied by Lord Hardwicke in cases where a testator had given a legacy (other than a merely residuary one) to a charity, and had charged his real estate with the payment of debts or legacies; so that, if the personal estate proved insufficient to pay all, it was applied first in paying the charitable legacy, and the other legatees or the creditors were remitted to the real estate.‡ Lord Northington, however, abandoned this principle, and it became settled that assets were no longer to be marshalled in favour of charities.§ "It does not appear," says Lord Commissioner Ashhurst, "what was the reason of the turn in the cases; but as the decisions have taken that course, we cannot alter them."‖

The rule against marshalling is applied not only between personal estate and charged real estate, but also between different kinds of personal estate—namely, pure personalty and mixed personalty; so that Chancery will direct charitable legacies to be rateably apportioned between the two kinds, and will then declare that so much as is apportioned on the mixed personalty must fail.

Lord Northington's course has had the unfortunate result, not merely of defeating many gifts that did not fall within the mischief contemplated by the Act, but also of causing

* *Att.-Gen.* v. *Tyndall* (2 Eden, 213).
† *Vaughan* v. *Farrer*; *Waterhouse* v. *Holmes* (2 Sim., 162).
‡ *Galton* v. *Hancock* (2 Atk. 430); *Att.-Gen.* v. *Graves* (Ambl. 155).
§ *Foy* v. *Foy* (1 Cox 165).
‖ *Makeham* v. *Hooper* (4 Br. C. C. 156).

much unnecessary expense, by rendering Chancery suits necessary in many cases as the only means of having the various items of the estate authoritatively ascertained, and the valid quota of the charitable gifts authoritatively apportioned. The Mortmain Committee of 1844 reported, that they did not "think it just that charitable legacies should alone be excepted from the advantage of having assets marshalled in their favour. Upon this point they would direct especial attention to the valuable opinion of Mr. Jarman."* And the Popular Education Commissioners of 1860 recommended the repeal "of the rule of Equity, that a charitable legatee shall be deprived of the privilege given to every other legatee, of taking his legacy from the fund legally subject to it."†

Yet it is now admitted to be lawful for the testator himself to marshal the assets, by directing the charitable legacies to be paid exclusively out of his pure personalty, and to be a first charge upon it; and the Court will give effect to such a direction.

Looking back upon the whole picture which we have now drawn of the policy and provisions of Sir Joseph Jekyll's Act, and the extensions and exceptions which have since sprung up around it, we shall see little that calls for the approval of the lawyer, the statesman, or the philanthropist. In the words of Mr. Hare, at once the most profound and the most practical of all writers who have treated of the subject of Endowments, this portion of "the law of England, as it at present stands, is inconsistent and incongruous, and a reproach to the jurisprudence of an enlightened nation."‡ The Mortmain Committee of 1844 declared themselves "bound to state, from an attentive consideration of the evidence submitted to them by witnesses whose means of information and authority must be held to be great, that the operation of these laws is most unsatisfactory, leads to doubt, expense, uncertainty, and litigation, and frequently

* Parl. Papers, 1844, x., 509. † Report I., 514.

‡ Transactions of Social Science Association, 1862, p. 164.

defeats good and pious purposes, which the present aspect of the country would induce all men to wish fulfilled; while, from the existing facilities for evasion, they cannot be regarded as serving the main purpose for which they are supposed to be maintained—by securing the heir from the unexpected alienation of property."*

Amongst the many desirable gifts which the Act of 1736 has prevented from taking effect, may be mentioned that of George Moore.† So again, in 1858, a Miss Read bequeathed to the Brompton Hospital for Consumption "all the estate which I can by law bequeath." Her pure personalty amounted to £100,000; but there was also £40,000 worth of realty, which the Hospital was thus debarred from receiving.

In some cases, a noble feeling of honour has led heirs from whom land had been devised away in charity, or devisees whose gift had been qualified by some charge in favour of charity, to waive the advantage of the Act, and execute a conveyance to carry out the testator's benevolent intentions.‡

It deserves to be remembered that in 1737, the year after the passing of Jekyll's Act, a similar measure was introduced in the Irish House of Lords. It was defeated; a result which was probably facilitated by Dean Swift's presenting a petition that he might be excepted from the Bill in case it should become law.§ The petition stated that he had bequeathed his fortune to charitable uses, and if the exception were not granted him he should be under the necessity of remitting it abroad for the same purposes. As all his readers know—

> 'He gave the little wealth he had,
> To build a house for fools and mad;
> To show by one satiric touch,
> No nation wanted it so much.
> That kingdom he hath left his debtor—
> I wish it soon may have a better.'

The funds which he finally settled upon the hospital

* *Ubi supra.* † *Supra*, p. 72.

‡ See the Inquiry Commissioners' Reports, VII., 184, 264; IX., 681; XI., 19; XII., 508; XIV., 377. § Scott's *Life of Swift*, p. 438.

amounted to above £10,000—the whole of his savings for some thirty years. The gift was beneficent and wise; yet his friend Pope had given him the hint of a happier, and not less wise, beneficence, when he wrote—"I will enjoy the pleasure of what I give, by giving it alive, and seeing another enjoy it. When I die, I should be ashamed to leave enough for a monument, if there were a wanting friend above ground."

The following is the full text of the Act:—

STATUTE RESTRAINING GIFTS TO CHARITABLE USES, 9 GEORGE II. c. 36, A.D. 1736.

An Act to restrain the Disposition of Lands, whereby the same become unalienable.

9 Geo. II. c. 36. Preamble. Whereas gifts or alienations of lands, tenements, or hereditaments, in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs. For remedy whereof, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-six, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate

After 24 June, 1736, no manors, lands, &c., nor money, goods, &c., to be laid out in land, to be given for charitable uses,

(other than stocks in the public funds), be, and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) and be enrolled in his majesty's high court of chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books, usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

unless by deed indented and executed before two witnesses, 12 months before the death of the donor, and enrolled, &c.

II. Provided always, that nothing herein before-mentioned relating to the sealing and delivery of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor, or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock to be made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion.

The said limitations not to extend to purchases or transfers made for valuable considerations.

III. And be it further enacted by the authority aforesaid, that all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-six, be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.

Gifts, &c., made after 24 June, 1736, otherwise than directed by this act, to be absolutely void.

IV. Provided always that this act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or

But not to prejudice the two universities, or the colleges of

Eton, Winchester or Westminster.

hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of *Eton*, *Winchester*, or *Westminster*, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of *Eton*, *Winchester*, and *Westminster*.

No college to hold more advowsons than shall be equal to one moiety of their fellows, &c.

[V. Provided nevertheless, and be it enacted by the authority aforesaid, that no such college or house of learning, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices, as are or shall be equal in number to one moiety of the fellows or persons usually styled or reputed as fellows, or where there are or shall be no fellows, or persons usually styled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may, by the present constitution of such college or house of learning, consist, shall, from and after the twenty-fourth day of June, one thousand seven hundred and thirty-six, be capable of purchasing, acquiring, receiving, taking, holding, or enjoying, any other advowsons of ecclesiastical benefices by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited.] *Repealed by* 45 *Geo. III., c.* 101.

This act not to extend to Scotland.

VI. Provided always, that nothing in this act contained shall extend, or be construed to extend, to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland.

Passing from particular example to general theory, it remains to consider by what arguments such restrictions upon charitable gifts of land, as distinct from personalty, may be defended or assailed.

The reasons which led to the old statutes of Mortmain have long disappeared. The feudal rights of relief, wardship, and marriage, which were lost when lands passed into the hands of a deathless owner, have long ceased to exist; and our cavalry is no longer provided by means of military tenures. Equally little attention would be paid now to a

political plea which was urged in the place of these by the promoters of the modern "Mortmain Act," who insisted that beneficiary owners of land would be "more daring and active in defence against a foreign enemy, and more jealous of arbitrary power"* than mere corporators or trustees.

But another political plea that was urged in 1736 still retains some of its importance. The *inalienability* of the estates of endowed foundations is an evil whose gravity will be denied by none. Yet it was so early and so prominent an attribute of them, that from it the very name of *Mortmain* is derived.

Littré explains that phrase by referring to the use of *manus* by the Roman and the early French lawyers to signify Power, or Ownership; and says that, in the word "main-morte," *main* consequently means the right to alienate and transmit, whilst *morte* means 'exhausted,' or 'powerless' (as in the verb *amortir*). Hence "gens de mainmorte" are persons who cannot transfer or transmit title, whether on account of their being serfs, or of their being members of a corporation; and "biens de mainmorte" are things which cannot be transferred or transmitted, whether on account of their belonging to serfs or to corporators. That this derivation is the true one seems to be shown by its being the only one which accounts for the employment of the phrase in the law of Serfdom as well as in that of Endowment. Upon the same attribute of Inalienability depends the more paradoxical derivation quoted by Coke, which explains Mortmain as meaning Immortal Possession—"*manus* pro possessione, et *mortua* pro immortali."† So also does another, which is mentioned by Peckius, who says that a corporation cannot alienate, except "magna cum difficultate et solemnitate; *quemadmodum morientis hominis manus firmissime conclusum tenet.*"‡ But he gives another, and more popular derivation, based, not upon the fact that a corporation clutches its property with the tenacity of a dead

* Parl. History ix., 1122.

† Co. Litt., 2 b.

‡ *Tractatus de Amortizatione.* A.D. 1582.

man, but upon the fact that, like a dead man, a corporation never dies—" sicut semel mortuus denuò non moritur."*

(But Coke, who also quotes the last two explanations, gives as the true explanation one based upon the loss of feudal profits—escheats, wardships, marriage, and the like—which tenancy by a corporation involved, "and therefore it was called a dead hand, for that a dead hand yieldeth no service." Blackstone, however, refers it to the fact of "these purchases being usually made by ecclesiastical bodies the members of which, being professed, were reckoned dead persons in law; land, therefore, holden by them might, with great propriety, be said to be held in mortua manu."†

Popular misapprehension seems to have based a still more recent derivation upon Sir A. Hobhouse's phrase of "getting rid of the Dead Hand;" and it is now no uncommon error to suppose that property held in mortmain is so called because it was bestowed by the hand of a deceased Founder.)

All inalienability causes both economical and political evil to the country at large, by diminishing the quantity of land in the market, and artificially raising its value; thus repelling both the small capitalist who seeks a farm for his own use where "the magic of property may turn sand into gold," and also the successful trader who wishes to become a landlord and to found a family. A commodity so strictly limited in quantity as land is, should be rendered as freely transferable as possible, that the limits of the supply may not be artificially narrowed. Lord Hardwicke urged on behalf of the Act of 1736 that if the growth of mortmain continued, it would cut down the opportunities for that family ambition which forms "the great incitement to industry and merit, in trade, in study, and in the profession of arms;" and reminded the Lords of the difficulty which their ancestors found in obtaining estates in the days when "the church and perpetual charities had above half the lands."‡ His opponents replied, somewhat feebly, that men were at times led to acquire lands by the prospect of being

* Cf. Plowd. Comm. 193.

† *Commentaries*, vol. i. ch. 18.

‡ *Life*, by Harris, I., 312.

able to devise them in mortmain, and consequently that that power of devise was itself "a great incitement to industry and frugality, and consequently a great encouragement to trade."*

In the neighbourhood of large towns any restrictions on the opportunities of purchasing land are peculiarly injurious, as interfering with both the commercial and the sanitary progress of the neighbourhood. Yet it is precisely in and around large towns that the proportion of charity land to the land of individual owners stands highest; for it is the new wealth of the trading classes that is bestowed most freely for public purposes. Thus the Committee of 1862 upon the Ecclesiastical Commission received evidence that "The land locked up under charities and under the church enormously impedes the progress of the town of Lichfield."

Inalienability, nevertheless, is by no means an essential of charity property, although it was once an universal attribute. In England various statutes were passed to restrain alienations by ecclesiastical and eleemosynary corporations, whilst the rules of Equity made it utterly unsafe for unincorporated charity trustees to sell any land without obtaining the consent of the Court of Chancery.† Such restrictions, however, belong to the period when the administrative government of the State has not become sufficiently effective to provide a check upon the honesty or prudence of the administrators of the charity. As soon as this country advanced to the point of establishing a permanent board of Charity Commissioners it conferred upon them powers which have materially diminished—I shall show‡ that they cannot be said to have removed—the inalienability of charity estates.

But the most important disadvantages of an ownership in mortmain have been detected only by modern observation, and were not noticed by the statesmen who carried the Act of 1736. They are arguments of a purely economical character.

* Parl. History ix. 1129.

† See *Att.-Gen.* v. *Kerr* (2 Beav. 420). In 3 Beav. 91 is an instance of such a sale being challenged after the lapse of 115 years. ‡ *Infra*, pp. 97-98

Land is not likely to be turned to the best advantage by the administrators of a public charity. There is proverbial advantage in the master's eye, and an estate itself suffers as much pecuniarily, as does its neighbourhood socially and politically, from having an absentee landlord instead of a resident one. In a long series of years it is impossible for such estates to be permanently well managed. A good steward is followed by a bad one. An indolent receiver succeeds to a zealous one.

In the case of charity estates these evils are aggravated by the fact that the absentee owners have no self interest at stake. They can gain nothing personally by increasing the present income; they have no children for whose sake they might plan enduring improvements. Hence whilst every country squire knows every field on his estate, there are many charity trustees who do not know even the names of their farms. "It is generally found," says Mr. Hare, himself an official Inspector of Charities, "that such property is managed with less economy and is subject to heavier outgoings than that of a like kind belonging to private owners."*

The Mortmain Committee of 1844 appeal to the admirable condition of the Guy's Hospital estates in contradiction of this view. But the very evidence to which they refer shows that that condition was attained only by a happy accident. It was due to the good fortune of the Hospital in possessing a Treasurer who "devoted the greater part of his time for fifty years, and a considerable amount of his fortune to the superintendence of the affairs of the hospital. He has taken a personal interest in the management of the whole concern."† But not many charities can hope to secure a black swan; and few black swans possess the attribute of the phœnix.

A very satisfactory account was given in 1874 by the University Inquiry Commissioners as to the condition of the land held by the Colleges of Oxford and Cambridge:—"The

* *Transactions of the Social Science Association*, 1870, p. 327.

† Report of 1844. Evidence, Q. 780.

estates let at rack-rent are reported to be generally in good condition as regards buildings, drainage, and cottages. We have no reason to think that they are below the average in those respects, although there is apparently less outlay than is made by private landlords who improve their properties. . . . The cost of management . . is very low. The average lettings, the absence of arrears, and the apparently small amount of losses from tenants, testify to the care and vigilance of the Bursars."*

Lord Hatherley similarly appeals to "the estates held by the colleges in our Universities, and still more the lands held in Ireland by the public companies of the City of London," as fit to "bear comparison, as to their cultivation and management, with the lands held by individual proprietors."† But these are cases of lands which are managed, not by bare trustees, but by the actual beneficiaries of the Trust, and cases, moreover, in which these managers are of exceptional intelligence.

At times, no doubt, a governing body may be found possessed of all the zeal and all the opportunities of supervision of a resident private owner. But they will rarely possess the means to carry out their desires effectively. Few charities could afford to follow the example of Guy's Hospital, which has often spent the whole revenue of its Lincolnshire estate in extending the sea-walls‡ and building up new farms out of the waves. Almost every charity has more appeals for its aid than its utmost revenue can meet; and cannot repair its houses and drain its fields except by dismissing scholars or refusing patients. The revenue is so closely appropriated to its immediate work that at each audit the Treasurer fears to find the balance against him, and grudges spending any income merely to add to his capital. He will not drain or build or fence. He will not lay down arable land to grass. He has nothing to spare for roads or for sheds, for oil cake, or for manure. If farms are thrown up by the tenants he has no surplus funds, even if he have the

* Report, pp. 35-36.

† *Transactions of the Social Science Association*, 1859, p. 190.

‡ Report of 1844. Evidence, Q. 785.

surplus energy, to take them into hand as a private owner could do. The Charitable Trusts Act has, however, rendered some assistance by enabling the Commissioners to empower trustees to mortgage the charity estates for the purpose of raising money for draining, building, and other improvements.*

It is sometimes pleaded that the interests of tenants are more generously considered, and estates managed more leniently by public than by private owners. Such a plea is in reality a further argument for private ownership, for it recalls the opportunities which the administrators and their stewards possess for acts of jobbery. A Trustee can indulge without any personal sacrifice his natural desire for patronage and influence. It is not his own rent roll that is diminished by listening good-temperedly to the tenant's plea for easier terms. It is not upon his own banker that he draws the cheque for the new steeple or the agricultural sires' cup. In some instances this patronage is developed for political party purposes. So long as the tenancy of land or houses confers the electoral franchise, the owner of real property will be a centre of political power. Thus Lord Grey tells us that Greenwich Hospital "used to be one of the great [electioneering] interests in the county. It was one of the great objects of any candidate there to secure that interest."† This is, of course, an addition to the political influence which, as in the notorious case of the Coventry doles, the administrators of the charity may exercise over the objects of the charity, the recipients of their bounty; for influence over this latter class is, of course, the same whether the charity capital be invested in land or in the funds.

It must also be remembered that even if the charity contrives to render its estate as profitable as it could have been in the hands of a private owner, the extent of that profit will never be great. Land is a costly investment. So strong is the "earth-hunger" with all men who have

* 16 and 17 Vic., c. 137, s. 21; and 18 and 19 Vic., c. 124, s. 30.

† Hansard clxiii., 1389.

money to spare, so precious is the opportunity for field sports, and so great is the social distinction which is attached in this country to the possession of a large landed estate, that land has a second value quite independent of its agricultural capacities. Its price thus comes to be out of all ordinary proportion to its rental. In the case of charity lands the income, again, can seldom avoid undergoing additional deductions for the expense of delegating to paid officials much of the supervision and management which a private owner would not have had to delegate. The investment of charitable funds in lands must therefore be regarded in the great majority of cases as a material reduction of the means for carrying on the works of mercy for which the charity exists. A landlord, moreover, has always the risk of finding his tenant bankrupt when the rent-day comes, but the holder of Consols can sleep securely.

Again, till a public Register of charity lands, or of lands in general, has been established, Consols will present a more stable investment than real property. Formerly, indeed, Government stocks were even more insecure than lands; for as no trust would appear on the bank books the charity stock could readily be disposed of by a fraudulent trustee, or might easily be innocently confused with his own stock by his executors when he died. The creation, in 1853, of Official Trustees of Charitable Funds, in whom stock or shares belonging to a charity may be vested,* has afforded a simple means of obviating these dangers. It removes also the lesser inconveniences that were occasioned by the expense of sending periodical powers of attorney to receive the dividends, which the Official Trustees will now receive and remit by their own cheque to the local governing body;† and by the rule of the bank that more than four persons cannot be entered as joint holders of stock.

If these various considerations lead us to condemn the acquisition of lands by charities, we shall be encouraged by

* 16 & 17 Vic., c. 137, s. 51; 18 & 19 Vic., c. 124, ss. 17-28.

† It may also be remembered that a holder of Consols may now elect to receive his dividend by post. 33 & 34 Vic., c. 71, s. 20.

finding that our doctrine is not the mere speculation of theorists, but has obtained judicial and official sanction. Lord Hardwicke laid it down that "where a charity is to be created *de novo*, the better rule is for it to be laid out in personal property, for which the funds are convenient, affording a better and a readier income than land."* Hence the Court of Chancery still retains the rule that land is usually to be discouraged as an investment for charity funds.† And Lord Cairns has expressed an opinion that even in the case of existing endowments it would often be convenient for the charities to convert their realty into money.‡ An actual instance is referred to by one of the Endowed School Commissioners, who describes the property of Wheelwright's Charity, in Yorkshire, as "a difficult and troublesome estate to manage. It is very much scattered; it is in small holdings; there is a good deal to do in the way of keeping up and repairs; and it is so expensive an estate that probably for many reasons it may be for the advantage of the Trustees to dispose of it."§ Similarly the Irish Endowed School Commissioners proposed, twenty years ago, to entrust a considerable power of conversion to the local administrators of charities, and recommended, "That as regards endowments requiring constant vigilance, as house property, Trustees should be empowered to vary the security, and with that view to dispose of the endowment."‖ Very recently the English Charity Commissioners summed up the whole matter in the following emphatic words: "Upon the grounds, both of public policy and of advantage to the charities concerned, we are disposed freely to facilitate these sales, upon terms which shall satisfy sufficiently the requirements of the Act of Parliament. The trustees of a charity being a variable and commonly numerous body, not usually resident in the locality, and restrained moreover by the rules of law from acting freely in the management of the property and the expenditure of the rents, are rarely found to

* 1 Ves. Sen. 223. † *Att.-Gen.* v. *Wilson*, 2 Keen 680.

‡ Hansard ccxii., 1862.

§ Parl. Papers, 1873, viii. Evidence, p. 153.

‖ Parl. Papers, 1857, xxii., 271.

be eligible landlords. The fluctuation of the annual income, moreover (arising from the varying charges and drawbacks incident to the tenure of landed estates, and in these cases especially difficult of control) creates a serious objection to the retention of such estates for the endowment of Charities; since for such Foundations a fixed and regular income is especially desirable. The management of these properties is, in fact, almost universally found to be attended with a more or less excessive amount of expenditure. Instances have come under our observation in which the cost of management has habitually amounted to one-fourth, or even a larger proportion of the gross rental, and this where the members of the Governing Body have been gentlemen of station and intelligence, having undoubtedly the desire to discharge effectively in every particular their duty as trustees."*

There is but one argument for permitting charities to own land. It is urged that a landed investment gives the charity the prospect of an "unearned increment." This plea is stated with great force by Sir Francis Palgrave in his evidence before the Mortmain Committee of 1844. He insists that, "upon every principle of public policy, landed endowment is the best;"† because, whilst it is perfectly secure, it also increases in value with the increasing prosperity of the nation. All other investments are either insecure, like machinery and ships, or unimproveable, like Consols and mortgages. The Church of Rome, alive to these facts, spends large sums annually in the purchase of lands in the most promising western districts of the United States.

That during the long centuries of a charity's existence a considerable rise will take place in the value of its landed property, is a fact that will not be denied. The unearned increment is one of the most familiar of economical phenomena. Mr. Caird has calculated, from rating assessments and income-tax returns, that the annual value of the land

* Report for 1872. Parl. Papers, 1873, xxi., 16.

† Questions 114—119, and 190. Whilst a witness of practical experience, Mr. Edwin Field, says: "Land is the worst kind of investment that a charity can be allowed to hold." (Question 443.)

in England and Wales was £41,000,000 in 1857, but had risen in 1875 to £50,000,000—an increase of no less than twenty-one per cent., which at thirty years' purchase would be worth £270,000,000. In Scotland the increase was at the still more rapid rate of twenty-six per cent.—from £6,000,000 a year to £7,500,000. Even in Ireland an increase of six per cent. took place. Much of this rise has been "unearned," and has arisen from the exertions of neither the landlord nor the tenant, but of their countrymen in general. In France, every decree for the sale of Charity lands requires at least one-tenth of the income arising from the purchase-money to be annually capitalised, as a compensation for the loss of the prospective increment of the lands.*

(On the other hand, it will be remembered that since 1875 the value of land has been undergoing a steady decrease, which bids fair to continue. "I would," said Lord Derby, in his speech at Liverpool, last June, "I would strongly warn landowners against that common delusion that it is always better to hold on to an estate than to sell, because the price of land is constantly rising. No doubt that has been the experience of the last fifty years: but it does not follow that the experience of the next fifty years may not be, on the whole, in an opposite direction.")

As a matter of fact, the value of charity estates has increased even more rapidly than the average value of landed property in England. It is by townsfolks that most of our charitable endowments have been created, and consequently an unusually large proportion of charity estates lie in or near great towns—the very neighbourhoods in which the "unearned increment" is the most considerable. "I can pass for miles," says Mr. Hare, "through streets in London which I personally know to be charity property; and I believe that one-fourth of the metropolis consists of such property."†

Perhaps the most famous instance is that of King Ed-

* Report for 1856 of the Administration Générale de l'Assistance Publique, p. 26.

† *Transactions of Social Science Association*, 1866, p. 190.

ward VI.'s School at Birmingham. It received its lands in 1552. They then let for £21 a year. In 1873 their rental amounted to £14,000 a-year, and was still rapidly increasing. It may be added that at King's Norton, within a few miles of Birmingham, a similar endowment, of about the same value, was created about the same time, and that in the lapse of three centuries its annual value has increased only very slightly.*

From these facts it is not unnatural that conclusions like those of Sir Francis Palgrave should be drawn. If it is desirable that charities should exist, it is desirable that they should have ample means for their work, and, consequently, that their wealth should be in that form which is likely to multiply their means the most.

But this reasoning overlooks two important facts: firstly, that the increase of means which land produces is produced at the worst time; secondly, that there is a point at which increase of means ceases to be desirable.

The expectation of an unearned increment is not peculiar to the administrators of charities. It is familiar to all buyers and sellers of land. It is taken into account in the price of every acre that is sold. It co-operates with the other causes that we have already mentioned as enhancing the cost of land as an investment. A charity, therefore, that retains its land in prospect of this increment is sacrificing its present revenue for the chance of a remote and uncertain advantage. Now the early years of a charity are usually its most useful ones. We have shown at some length the inevitable tendency of endowed charities to be either neglected or perverted as time runs on. Hence it is utterly inexpedient to narrow their resources during their youth, for the purpose of augmenting their superfluities in their decrepitude.

For there is a point at which any addition to the means of a charity becomes superfluous. The value of its property may go on increasing indefinitely, but the objects for which the founder designed it have usually a definite limit.

* Parl. Papers, 1873, viii. 205.

When that limit has been reached, any surplus of money will be useless or injurious, unless it be a surplus so large as to cause an application to the public tribunals for a new "scheme" for spending it. When that point is reached, the surplus may be made to do some good, though *ex hypothesi*, not the same good which the founder had in view. But until it is reached, the surplus is only an embarrassment to the administrators, and a standing temptation to wasteful expenditure and lax supervision. There have been London charities whose funds increased so fast that the only course left for the governing body was to dine out of them as often as they could.* Like Lord Brougham's city companies, the governors came at last "to fear the light because their deeds were hospitable." To borrow Mr. Anthony Trollope's felicitous distinction, "the Charity goes on and prospers; at least, the Charity goes on and the estates prosper."

The suggestion has, indeed, been thrown out that as a charity investment lands have the advantage, not merely of increasing in value, but of increasing with a self-adjusting increase. The same growth of population that augments the value of real property in a district, augments also the number of its poor. As a town advances, its need for schools, hospitals, and almshouses advances proportionately. The Birmingham Grammar School, already referred to, is an apt instance of this self-adjustment of the revenue to its objects. Conversely, those irruptions of the sea which have reduced Dunwich from a city to a hamlet, have turned much of its 155 acres of charity land into a mere marsh.

But this observation is only applicable where the estates of the charity lie in the district from which its recipients come. Where the income is drawn from one place and is spent in another, there is no connection between the expansion of the supply and the expansion of the demand. The cases are very common in which a man has left his native village for some busier town, has risen to acquire property in his new home, and then in the days of his age has remembered his

* See Lord Lyndhurst's account of a dinner of charity trustees at Greenwich. Hansard, lxxxvi., 746.

youth, and devised the property for the benefit of his birth-place. In such a case there is every likelihood that the town to which he migrated for the very sake of its prosperity will continue to prosper far more than the village which he abandoned for it. The revenue will continue to improve, like the parish from which it comes, although the parish where it is to be spent may stand still, or may decay.

Thomas Seckford endowed his almshouses at Woodbridge, in 1578, with land in Clerkenwell worth £112 a year. Clerkenwell has increased until the lands have become worth £4454 a year; and Clerkenwell's need of charitable relief has increased in at least an equal proportion. But it is at Woodbridge that the money is to be spent, in a town which has been decaying ever since the railway destroyed its shipping trade, and amongst a population of less than 5000 people, whose habits of thrift it has sapped for generations. There is Jones's charity at Monmouth, which was endowed in 1714 with (amongst other property) 320 acres of land at Deptford. Deptford is now in London, but the wants of Monmouth have not materially increased since the days of Mr. Jones; its population in 1868 was under 6000, whilst the school had a net rental of £2147 yearly, and a surplus of £1470 yearly, with a prospect of great augmentations when the leases fall in. James Ravenscroft devised thirteen roods of land, the rents whereof were to provide for the repair of his tomb in Chipping Barnet Church, and the residue of them was to be spent in the repairs of the church itself. But the land lay at Bethnal Green; and its rents amount now to *fourteen hundred pounds a year.*

Sometimes a single foundation possesses estates that expand in strikingly different proportions. John Lyon, who founded Harrow, gave one set of lands to repair roads, and another set, more than three times as valuable, to support his noble school. This was in 1571. In 1864 the proportions were reversed. The school estates were worth little more than £1000 a year, whilst the annual value of the road estates was about £3500. Yet the school was more efficient

than ever, whilst the road trust, since the passing of the highway laws, had become an useless anachronism, benefiting no one but the ratepayers. Under these circumstances, the appropriation which the founder had made of his different estates "has led," say the Public School Commissioners, "to a result which he never contemplated, and which is probably very remote from his intentions."* In like manner at Rugby time has not merely changed, but has actually reversed the value of two estates which support the school. The land in Warwickshire which once supplied by far the largest part of the whole income of the school, now produces in the way of income but one part out of forty-six. The land in Middlesex, which was only given as an after thought, and produced but an inconsiderable portion of the whole income, now produces forty-five parts out of the forty-six. "The national and metropolitan site of the property bestows all and receives nothing, the provincial site bestows comparatively nothing and receives all."† Similarly, again, at Aldenham in Hertfordshire, a grammar school was founded in 1596, and was endowed with two estates, one in that parish and one in St. Pancras. But in 1860 the St. Pancras estate brought in more than £2550 a year, and the Aldenham estate less than £190. Had the Founder foreseen this, he would never have appropriated his benefits to Aldenham instead of to London, unless we suppose "that a fanciful attachment to place overcame his regard to his fellow-creatures."‡

A minor advantage of land as an investment has sometimes been found in its *obviousness*. It can not be lost like a debenture, or forgotten like a sum in Consols. But though the land itself cannot be mislaid or overlooked, the facts of its ownership may be. If the trustee lets it to himself, or if the charity is a corporation sole, it may easily become confused with private property, as often happened in the case of grammar schools whose master was himself the corporation.

* Report (Parl. Papers, 1864, xx., 208). † Ibid, p. 269.

‡ Report of Popular Education Commission, I. 505. The Aldenham estate originally produced £27 a year.

Or if the title to the lands remains unimpaired the lapse of time may destroy the evidences of their area, especially as no minute acquaintance with the boundaries can be expected from the trustees. The Charity Commissioners reported recently that "The endowments of certain almshouses at Towyn in Merionethshire are in danger of being lost in consequence of questions that have arisen as to the identity of the land charged with the endowments."* These perils point to the necessity of creating compulsory registry of all charity lands, with a full set of maps, by which alone such dangers can be rendered impossible. Such a registry would complete the policy which was initiated in 1736 by requiring all future conveyances to charities to be enrolled in Chancery,† was continued in 1853 by the provision enabling the Charity Commissioners to accept the custody of title deeds,‡ and was carried in 1855 to the point of authorising them to enrol "any deed, will, or document relating to any charity," so that their office copy of it will be legal evidence.§ Were such enrolments made compulsory, it would scarcely be necessary to take the further precaution which Mr. Hare advocates,‖ of making the condition, administration, and capacities of charity lands a topic of instruction in the primary schools of the neighbourhood. The rudimentary germ of this plan may perhaps be found in the old custom by which the parish boys were periodically whipped at the parish boundaries. In the more modern shape it is advocated by its author not only on educational grounds as an apt means "of teaching history, topography, political and social economy, and of introducing technical instruction," but also for political reasons; because it would stimulate the generosity or ambition of new founders, and also because "in such a state of public information we could without the smallest apprehension of evil repeal all laws that impede the dedication of land to perpetual uses, and could promote

* Parl. Papers, 1877, xxvi., 14. † *Ante*, p. 76.

‡ 16 & 17 Vic., c. 137, s. 53.

§ 18 & 19 Vic., c. 124, s. 42.

‖ *Transactions of Social Science Association*, 1870, p. 327.

every disposition of its possessors to convert into public what was heretofore private property."

The 'obviousness' of land has always rendered the real property of corporate bodies a tempting subject of confiscation to jealous or embarrassed governments. The danger is sufficiently great to have rendered Roman Catholic donors very chary of investing their gifts in English land. At the same time there are politicians by whom this facility for appropriation has been regarded as an advantage. At the present day, of course, the official records of charity property of all kinds are sufficiently minute to have rendered personalty at least as readily discoverable by the State as realty ever was.

Considerations of the undesirableness of allowing land to pass into mortmain produced between the reigns of Edward I. and George II. a succession of enactments to render *void* various classes of gifts of land for corporate and charitable purposes. But this only guarded against one evil by substituting a greater. It is possible to avoid the danger against which these enactments are directed without inflicting upon the interests of charity the losses which they cause. The law may permit land to be devised for charitable purposes, and yet keep it from passing into the hands of the charity in the shape of land. The wealth of charities may be converted into an innocuous form without the necessity of impoverishing them. *Mobiliser les terres* is a simple clue to the solution of the great political problem of Mortmain.

With this object it was proposed by the Law Amendment Society's Committee, in 1861, to abolish the distinction between real and personal estate in such perpetual dedications of property, and enable every person to give land as freely as he can give money; but, at the same time, to require that all lands so given or devised, except such sites or plots as might be necessary for the institution that is founded (as, for example, the land on which the church, or school, or hospital stands), should be sold or converted into money within seven years. The land thus excepted for occupation purposes need never be of any great extent; the

largest quantity required would be in the case of an agricultural college.

This plan of conversion has been accepted as feasible by no less practical a statesman than the present Lord Derby. In 1869 he said that, "It would be well to impose beforehand upon all future founders some particular manner of investment. If we continue to allow, as at present, any individual to dispose in perpetuity of a sum of money, it does not seem unreasonable to insist that the capital shall only be invested in one way, that is, in the public funds."*

An apt precedent for such an enactment might be found in the provisions of the Act of 1870, which authorised charities to lend their money upon mortgages of land without complying with the formalities of the Mortmain Act; and which expressly directs that such a mortgage shall entitle the charity only to a sale and not to a foreclosure, and that if, by release or otherwise, the equity of redemption should become barred, the land shall be held on trust for sale.†

If the legislature should consider it important to protect the charities which it may thus compel to sell their lands, from the depreciation in value to which money is subject, it might provide that (except where the charity was in immediate need of money), the sale should not be made for a lump sum, but for a perpetual rent charge, varying with the price of corn, after the manner of those created in commutation of tithes. By registering these rent charges they might be protected from the objection which renders an ordinary rent charge an undesirable investment for charities —that it is difficult to give judicial proof of it if the landowner choose to refuse payment, and hence that it is apt to become barred by the Statute of Limitations.

If experience disclosed no difficulties in the working of this plan, the principle might then be carried to its full extent by applying it to the lands of existing charities. Forty years ago Mr. J. S. Mill wrote that the very first step in a reform of our Foundations would be "to dispose of the

* *Journal of Society of Arts* xvii., 686. † 33 and 34 Vic., c. 34, s. 2.

estates of all the public trusts in Great Britain by sale to the highest bidder, and invest the proceeds in the stocks or other moneyed securities."* The vast quantity of land that would be brought into the market by such a measure would of course render it necessary to spread the sales over a large number of years. Half a million acres, one-sixtieth of the entire surface of England, cannot be sold in a day. But Mr. Hare, who approves of the principle, considers that a period of twenty-five years from the passing of the enactment would be sufficient to allow for the due sale of the whole.†

It is unnecessary to remark upon the opportunity which the conduct of these sales would afford to the Government for facilitating the acquisition of land by co-operative farming societies, by peasant proprietors, by yeoman capitalists, or by any other class which the investigation of our present agricultural crisis may indicate to statesmen as the missing link between land and profits. It is difficult to believe that some vast change in our present agricultural system is not inevitably near; it is equally difficult to discover any field where it can be effected with so little disturbance of individual rights, as in the lands that are free from all individual ownership.

Without waiting, however, for the time when public opinion is ripe for any general compulsory measure, much may be done to facilitate that conversion of charity land into money which has been going on for the last quarter of a century. Since 1853, when the Charity Commissioners first received power to sanction these sales, no fewer than 4481 have been authorised, producing in purchase money the total amount of £4,382,607 13s. 7d. The annual average of the last five years has been £328,817 4s. 8d. But for the Act of 1853, none of this land could have been sold without a Chancery suit, and very little of it, therefore, would have been sold at all. Most grave social injury must have been inflicted by the law which had practically excluded this land

* *Jurist*, 1833, p. 26.

† *Transactions of Social Science Association*, 1866, p. 189.

for centuries from the public market, and left it in the Dead Sea of mortmain.

But though the legal difficulty has been thus greatly diminished, there are still many forces at work to impede the sale of charity estates. In most cases the Trustees are so numerous that it is hard to get them all together, and still harder to get them all to agree. In any case they will shrink from a wearisome negociation with the Charity Commissioners, and the worry of a sale, and the chance of a lawsuit with the purchaser. They will feel little desire to lose the dignities of landed proprietorship and the courtesies of the shooting season. Their intelligent and expensive subordinates, the steward, the surveyor, and the accountant, have no desire to lose their offices. To a governor of the great Birmingham Grammar School the proposal to convert its estates into Consols naturally appeared to be "the most astonishing madness that the imagination of mankind could conceive."* The personal necessities or personal interests which in the case of a private owner might outweigh all this and bring about a sale are entirely lacking.

Hence charity trustees are not very ready to take the initiative in selling their estates; and the readiness is unfortunately in the inverse proportion to the size of the estate and to the consequent desirableness of rendering it marketable. But both the English Charitable Trusts Act† and the Irish Act of 1867‡ require initiative action from the trustees before the Commissioners can sanction any sale. The English Endowed School Commissioners took a more effectual as well as a safer course, by placing the power in the hands of a central authority. Under the advice of Sir Arthur Hobhouse they introduced in their school schemes, clauses which provided for the sale of school lands at the discretion of the Charity Commissioners, without requiring, as does the Charitable Trusts Act (16 and 17 Vic., c. 137, s. 24), that the Trustees should take the

* Parl. Papers, 1873, viii., 223. † 16 and 17 Vic., c. 137, s. 24.
‡ 30 and 31 Vic., c. 54, s. 14. Its language is copied from the English Act.

initiative, or even requiring that they should assent to the sale. The clause ran: "The governors *shall* from time to time, when and as favourable opportunities offer, if the Charity Commissioners deem it to be for the permanent benefit of the Trust, and with their sanction, sell such real estates of the Trust as are not required to be used for the objects of their scheme; and shall, with the like sanction, invest the proceeds in such mode as the Court of Chancery, in exercise of its statutory powers, or as any Act of Parliament may authorise for the investment of trust funds in general, or in such other securities as the Charity Commissioners shall approve."* Moreover, both the English and the Irish Acts put a further check upon sales by requiring, not merely that the full market value shall be paid for the land, but that the sale, "under the *special* circumstances," shall produce some distinct advantage to the charity, as, for instance, by increasing its income. It is not sufficient that the public will be benefited and the charity not injured. The Commissioners adhere loyally to this requirement. Its observance, they say in their Report for 1872, "is strictly insisted upon by us in all cases, regard being had not only to the present value of the property to be sold, but also to any prospective improvement that may be reasonably anticipated. The prices realised have, in fact, led almost invariably to a large accession of revenue to the Charities, the direct augmentation of the income being greatly enhanced, moreover, by the more or less complete relief from all outgoing and expenses of management, and also by the entire regularity of payment."†

Moreover, it must not be supposed that the sales which take place represent the final withdrawal of so many acres of land from the evils of mortmain management. The estates change, but do not vanish. The Act of George II., as we have seen, strangely omitted to place any restriction on the purchase of lands by charities; and full advantage is taken of this liberty. The Charity Commissioners say, in their

* Parl. Papers, 1873, viii. Mr. Alderman Lawrence's questions, Nos. 2923-6; also Nos. 1415 and 3037.

† Parl. Papers, 1873, xxi., 16.

report for 1855: "It is generally inexpedient to permit the conversion of the real endowments of charities into personalty, and our orders authorising sales are in all ordinary cases accompanied by a condition imposed on the trustees, that the purchase-money shall be re-invested in land at the earliest opportunity, under our direction."* The Charitable Trusts Amendment Act favours these reconversions, by permitting them to be effected by charitable corporations without any licence in mortmain,† in direct opposition to the policy of the Act of 1736. During the five years 1874-8, Stock standing in the names of the Official Trustees was sold or retransferred by them to the extent of £775,569 10s. 9d.; and this was principally for reinvestment in land.

Land, too, is often bought by charities as an investment of moneys that have not arisen from the sale of other land. King Edward VI.'s School at Birmingham "frequently, with the advice of the Charity Commissioners, purchases real property, sometimes out of income and sometimes out of capital."‡ Such investments are habitually recommended by the advisers of charities, and are often expressly sanctioned in their private Acts of Parliament. In Scotland they are pronounced to be undesirable for private trusts, but "generally a very suitable mode" for investing the money of mortifications—that is, of trusts of perpetual duration.§

We have already commented upon the fact that the English Act of 1736 imposes no check on these purchases of land by charities, although the economical or political evils are exactly the same as in the case of land obtained by donation or devise.

III.—Extent of Gift.

Without utterly prohibiting a man from giving any of his property to endow a Charity, it is still possible for the law to impose restrictions as to the amount of property so

* Parl. Papers, 1856, xxii. 218.
† 18 & 19 Vic., c. 124, s. 35.
‡ Parl. Papers, 1873, viii. 206.
§ Bell's *Lectures on Conveyancing II.*, 955.

given. Such restrictions may take the form of prohibitions to give property amounting to more than a specified absolute value, or to give property amounting to more than a specified proportion of the giver's whole fortune, or to give any but a specified quantum of ownership in whatever property is given. Familiar instances of all these may be found.

A restriction of the absolute value of the gift occurs in the Church Building Act of 1803, which enacts that under the particular powers of gift and devise conferred by it—

"No more than one such gift or devise shall be made by any one person, and that if any such gift or devise shall happen to exceed *five acres in lands* or tenements, or the value of £500 *in goods and chattels*, every such gift or devise shall be good and valid only to the extent aforesaid; and it shall be lawful for the Lord Chancellor for the time being, on petition, to make order for reducing every such gift or devise to and within the said limits, and for allotting such specific five acres, and if occasion should require, such specific goods and chattels, as in his judgment shall be most convenient."*

Similarly the Statutes of Ontario enact (chap. 216, s. 19) that no single gift of land to a religious society must exceed the annual value of a thousand dollars. (They also require that all land so given must be sold within seven years, and the purchase-money be invested by the society in pure personalty.)†

More commonly, however, the rule takes the form of a restriction of proportion, and for the sake of protecting the expectations of near relatives, bids the owner be just before he is generous, and forbids him to give away more than a certain share of his property. Such restrictions may, of course, apply to gifts made to any private person outside the family circle, as well as to gifts made to charities. It is, indeed, in that more general form that they still prevail in the modern law of wills throughout the Continent, and even in our own Channel Islands; as they once prevailed in English law both in the case of wills, and to some extent even in that of conveyances inter vivos.‡ But it is only in the narrower form of a restriction upon gifts to charities that they are ever likely to reappear in this country. In that form, there is much to be urged for their restoration.

* 43 Geo. 3, c. 108, s. 2. † Cf. p. 95, *supra*. ‡ Glanvil vii., 1.

It will, indeed, follow from principles which we have already laid down, that no such restriction must be so extensive as to amount to a practical prohibition of new Foundations. The law must not deter men of wealth from recognising the responsibility that lies upon them, and using God's gifts for all the purposes for which they were given. The limit of the restriction may not be easy to fix. The precise extent of the Christian obligation of almsgiving, it is, indeed, a subtle question of casuistry to determine, even in any given individual case. And stated as a general ethical problem,—how far the immediate and ordinary claims upon men's wealth must be postponed to those which are less obvious and more exceptional,—it probably does not admit of any general solution. But it is at least clear that, up to some point, however hard to define, the immediate and ordinary claims are imperatively entitled to priority. If so, it may be necessary for the State to secure them that priority.

It is not sufficient to say that the general principle of Legitim has been tried in England, and has been abandoned by common consent for more than a century and a half, as unsuited to English habits and ideas. It is quite true that our nation is practically unanimous in preferring the rights of free will-making and of parental authority to the claims of the surviving members of the household; although it is remarkable to how great an extent the exercise of those legal rights is restrained by moral feelings that survive from the days when our law reserved to the children their *partes rationabiles* as stringently as the Continental codes still reserve the *portion légitime*. The "legacy hunter" is as much despised here as abroad. An ordinary English Will distributes the maker's property with an impartial fidelity to the claims of blood, that allows little scope to personal preferences, or even to moral distinctions. Very faithfully does George Eliot depict the traditional sentiment of at least our middle classes:—"To live respected, and have the proper bearers at your funeral, was an achievement of the ends of existence that would be entirely nullified if, on the

reading of your will, you sank in the opinion of your fellow men, either by turning out to be poorer than they expected, or by leaving your money in a capricious manner, without strict regard to degrees of kin. The right thing must always be done to kindred. The right thing was to correct them severely, if they were other than a credit to the family; but still, not to alienate from them the smallest rightful share in the family shoe-buckles, and other property." *

But a jurisprudence which utterly repudiates the general principle of a Legitim, may nevertheless, with perfect consistency, deal with charitable bequests in an exceptional manner. No ordinary testator is likely to avail himself of his legal power of giving his property away from his relations to a person unrelated to him, except where he has found singular misconduct in the one or received singular service from the other. But in the case of charitable bequests there are special forces at work to conflict with the impulses of family affection. Vanity, remorse, sacerdotal pressure, benevolent zeal, may prompt a gift to a charity, though they would not prompt a gift to a stranger. A man, too, who has taken a causeless dislike to his relations, finds a salve to his conscience if in gratifying his spite he benefits some laudable institution. This far greater hazard of injustice to the testator's family is the justification of those principles of English law, which have called forth so much adverse criticism, by which a man is allowed to devise his estates to his mistress, but is forbidden to devise them to his Church. Where there is special danger the legislator may well furnish special protection. He will foresee, but can hardly approve, such wills as that by which Eliza Parks, of Clones, in 1844, directed her executors, "After payment of £1 per month to my sister Margaret, *for subsistence*, to apply the residue, if any, at my death, for the benefit of the Primitive Wesleyan Methodist Society in Ireland."† It was probably neither from an unusually guilty nor an unusually tender conscience that

* *Mill on the Floss*, Bk. iv. ch. 1.

† Parl. Papers, 1846, xlii., 113.

Maurice Roche, of Ahane, declared his will to be "that half the profit rent of my part of the lands of Cappafadun shall be laid out by my executors in charitable purposes, according to the words of my intentions, which are thus:—For the benefit of my poor soul, God help me, as a kind of atonement for the great crimes I have committed against the commandments of God, I do award, and it is my will, part of it will go to the benefit of the poor souls of my fellow creatures, both male and female, that I have in course of my life kept as much as one penny of his, her, or their money or substance by fraud, deception, or ignorance, by mistake or forgetfulness, or any way in the world. I do award, and it is my will, that part of the said annuity do go to the benefit of those my fellow creatures, both male and female, that I had corrupted their innocence, and those that I had trespassed on their reputation, or that I was the instrument of their committing mortal sin."*

By means of a charitable Foundation, a man may so connect his name with his property as to preserve it for ever, though the English law, in its inveterate dislike of perpetuities, will not permit him to do this in any other way, even by the strictest entail, for more than two generations. The most striking instance of a triumph of posthumous vanity over family ties is that of Tancred, who left his lands away from his sisters to found a charity, avowedly that he might keep the estate consolidated and in connection with his name.† The property which he gave in charity

* Ib. p. 113.

† His indenture of settlement, dated 1721, was made "in consideration of the affection which he bore to his Manor House of Whixley (the place of his own birth, the seat of himself and family for a long series of time,) and being desirous that his estate there, so compact in its situation, and so commodious by the improvements made at the expense and industry of himself and ancestors, should never be dismembered by a distribution amongst heirs female; but that the same should be enjoyed by the heirs male of his own body, as long as any such should be, by which the said estate would be kept entire, both in his name and blood; and upon failure of such heirs, should be vested in the Trustees thereinafter named, and their successors for ever, to preserve the payment of the several yearly sums for ever thereby granted and limited." He then proceeds to direct this manor house, and all the outbuildings belonging to it, to be maintained for ever, "and that none of the aforesaid buildings should be pulled down or in any respect altered, or new buildings erected." (Charity Commissioners' Report of 1866, p. 42.)

produces upwards of £4000 a year; the amount which he bequeathed to his five sisters was "one shilling each out of all my real and personal estate." "He seems," said Lord Keeper Henley, in adjudicating upon his gift, "to have cast off all natural affection."* Orations in eulogy of him are nevertheless still composed and delivered annually; his modest consciousness of merit having led him to prescribe in his Foundation that every anniversary of his death should be honoured with a sermon and three Latin speeches. Elsewhere in Yorkshire there is an almshouse for six old people, with a gratuitous boarding-school for twelve boys—all the eighteen of whom for ever are to wear an R embroidered on one shoulder, to commemorate the fact that the Founder's name was Read.† In both these cases the local effects of the charity have been eminently deleterious.‡

* 1 Eden 10. † *Journal of the Society of Arts*, xvii. 685.

‡ Part of Tancred's gift was to establish studentships; and they have proved beneficial. But his great object, the hospital at Whixley, proved worse than a failure. "We cannot," say the Charity Commissioners, "find that it has ever been in such a state as to afford a comfortable or even a respectable mode of life to its inmates. And we have been furnished with a number of extracts from the governors' books and minutes, extending from the year 1809 down to the present time, disclosing a state of quarrels, heart-burning, and misbehaviour among the inmates, which appears to have had little intermission, and which must have made the place wretched to its inmates, and highly inedifying to the neighbourhood. These mischiefs have not diminished with the progress of the time. On the contrary, the violent and outrageous character of hostilities which broke out among the pensioners during the autumn of 1865 was calculated to bring more scandal upon the place than anything which has come under our notice." "The foundation of the hospital is radically vicious in principle. It is, indeed, difficult to see how such an arrangement can be expected to work harmoniously. The plan is to take twelve men, past middle life (and therefore of fixed habits), who have declined from their original rank of life (and therefore are likely to be inferior in character and soured in temper), and to place them away from the comfort and the restraint of their families, in a locality with which they have no association, without any common tie between them, either of religion or of profession, such as may be found in other cœnobitical establishments, without any efficient discipline to control them, without any occupation to employ them; and there to leave them to pass the last years of their life among strangers. The plan seems much more calculated to answer the Founder's expressed wishes of perpetuating his name and keeping his estate intact, and saving it from division among his sisters and their families, than to promote the welfare of those whom he wished to be his living monuments for ever." (Parl. Papers, 1867, xx. 24.)

In some cases of merely petty Foundations, ingeniously circuitous means have been found of associating the Founder's name with his gift. At Melbourne, in Derbyshire, there are two instances of this: the gift of Henry Greene, in 1679, to supply four poor women every 21st of December with four *green* waistcoats, lined with *green* galloon lace; and that of Thomas Gray, in 1691, to buy annually for poor men and women coats and waistcoats of *grey* cloth.* Similarly at Barnes, in Surrey, Edward Rose, in 1652, left land in trust, amongst other purposes, to preserve *rose* trees on his grave.† Family pride took another direction in the bequests which Elizabeth Townsend made, in 1820, to the churches of Westbury and Warminster, in Wiltshire, of £3 yearly apiece, on condition that, on the Sunday before Midsummer Day, there should be sung at the morning and afternoon service "the anthem composed by my late husband's grandfather from the 150th Psalm."‡ The buildings of a Charity at Saltash, in Cornwall, bear this inscription:—"This almshouse is a gift of James Buller, of Shillingham, Esq., deceased, whose glorious memory as well as illustrious favours ought not to be forgotten, but kept, as 'tis to be hoped they will, in everlasting remembrance. 1726." According to the Inspector's report, the premises are a nest of disease, and a permanent nuisance.§

Lord Hatherley has declared it to be his opinion that "the preference of the poor in general to the testator's own relatives is far more often the result either of superstition or vanity than of benevolence. . . . . In almost all posthumous charity, charity is but another name for vanity."‖ He cites the case of a man who founded a large hospital, and left £400,000 for its endowment, "disinheriting his own family, and leaving them paupers, for the sake of being designated at public dinners as a great benefactor."¶ And

* Charity Inquiry Commissioners' Seventeenth Report, p. 296.

† Charity Inquiry Commissioners' Tenth Report, p. 589.

‡ Twenty-seventh Report, p. 781.

§ Report of Popular Education Commission, iv. 321.

‖ *Transactions of Social Science Association*, 1859, pp. 69, 190.

¶ *Infra*, p. 250.

even that thorough-going advocate of charitable bequests, Mr. Hadfield, whilst urging that those which had come under his cognisance were "generally dictated by the highest considerations that can actuate the human mind," concedes that "there may be a little vanity at the bottom of it—I will not deny that."*

Lord Romilly, in his evidence before the Schools' Inquiry Commission, recommended as the result of his experience, a provision "that where a man has relations as near in degree as nephews or nieces, he should not be allowed to dispose by will of more than a certain portion of his property in favour of a charity; and that that aliquot part should be proportioned inversely to the nearness in degree of the relative he leaves behind him, like legacy duty. *This opinion has arisen solely from my having seen cases which I thought very hard.* I have one now present to my mind where a man left a large fortune away from an only child, a girl whom he had brought up in affluence, and whom he left in straitened circumstances."

It is true that at present the English law of succession makes differences of degree only, and not of kind between the various classes of relatives. Yet it is easy to see that there is a specific difference between the claims of those near relations whose wants even in his lifetime the deceased would have been expected to see supplied, and the claims of remoter ones, whom society does not regard it as incumbent on him to provide for or even—if his fortunes rise—to extend his bounty to. The line between the two classes will be drawn differently in different times and places, but such a distinction of classes is universally recognised. Indeed, English jurisprudence has in more than one instance gone so far as to draw a definite boundary line between them. The Poor Law binds a man to provide for certain relatives only; Lord Campbell's Act permits compensation for a man's death to be made to certain relatives only; and the law of Simony permits a double resignation bond in favour of certain relatives only. Why should not a similar distinction find a

* Report of Mortmain Committee of 1844. Evidence, Q. 343.

place in the law of Charities? The principle of a *pars rationabilis* was sounder than our present rule of allowing a man to rob even his nearest heir in favour of a stranger, but of preferring even his remotest heir to any Charity.

It is possible that in framing any such provision, a further distinction might be revived, familiar in most of the primitive and the feudal codes of real property law, and in Glanvil's day familiar in our own—the distinction which gives less power of alienation over inherited property than over purchased property. The old antithesis between the *hereditas* and the *quæstus* has disappeared from English law, except in such rare cases as where it is employed to determine between two "stocks of descent." But popular morality recognises a salient difference between the man who devises away from his family line what came to him purely by virtue of his being a member of that family; and the man who devises away only that property which has been accumulated by his own industry or self-denial.

In New York, by a statute enacted in 1860, any person having a husband, wife, child, or parent, is precluded from bequeathing more than one-half of his net property to any society, association, or corporation.* In Georgia, a gift by will to charitable uses is made void if the testator has a wife or issue living, unless made ninety days before his death.

The Bill of 1845, "to alter and amend the laws relating to the disposition of property for pious and charitable purposes," contained a remarkable provision for adjusting the conflicting claims of the kinsfolk and the Foundation by a more flexible mode than that of a defined legitim. Lord John Manners proposed by it to provide that—

"If after the making of any such gift or grant for pious or charitable uses or purposes, any such testator, donor, or grantor, shall have died leaving any parent, wife, child, or grandchild, who by reason and in consequence of such gift or grant shall have been left destitute, or insufficiently provided for, it shall be for every such parent, wife, child, or grandchild, to apply to the Lord Chancellor or Lord Keeper for the

* Laws of 1860, ch. 360, sec. 1. Under the Law of 1848, ch. 319, s. 6, only one-fourth was allowed to be given; and in this form the clause reappears in the laws of Iowa (Revised Laws of 1860, sec. 1198).

time being, by petition in that behalf, setting forth all the circumstances of his or her case ; and thereupon the said Lord Chancellor or Lord Keeper shall forthwith proceed to inquire into the facts so alleged in such petition, in such manner as to him shall seem most expedient ; and if, upon such inquiry, the said Lord Chancellor or Lord Keeper shall be fully satisfied of the truth of the said facts, then it shall be lawful for him to make such order as to him shall seem reasonable for allowing to every such parent, wife, child, or grandchild, for his, her, or their life or lives, or for any shorter period or periods, so much and such portion of the proceeds or profits arising from the property, estates, or effects so given or granted as aforesaid, as may be sufficient for the support or maintenance of such parent, wife, child, or grandchild, during any such period as aforesaid ; and from time to time to alter or annul such order, and to make such order or further order and regulations in that behalf as the justice of the case and the wants of the several parties interested may seem to him to require."†

But even if no restraint be placed upon the amount of property which may be given, it is still possible to restrict the extent of interest, the quantum of ownership, which the donor may transfer in that property. An instance of this may be found in the English Act of 1736, which although passed to cut down gifts of lands to charities, nevertheless imposed a minimum limit to them, and provided that every such gift must "take effect in possession immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." This apparent paradox is of course explained by the reliance which the framers of the Act placed upon human selfishness. They saw that the more absolute a gift was required to be, the less was the chance of a man having the generosity to make it. The section has doubtless had all the effect they designed; and even more, for it rendered void many gifts, and even many sales, to charities, in which some reservation or agreement that caused no practical detriment to the value of the gift, had been inserted from technical reasons of conveyancing. Thus it was doubted if a charity could buy land except for a lump sum; consequently in those districts where vendors decline to sell except for

* Parl. Papers, 1845, iv. 543.

perpetual rents, charities practically could not buy land at all. So again the clause made it impossible for a man to give a site for charity premises without giving also, to no purpose, the minerals under it; or to give a park or a churchyard without abandoning all right of way through it; or to give one of several building lots without depreciating the value of all the others by releasing it from their common covenants for preserving the uniformity of the buildings, streets and sewers to be placed there. In all such cases the deed was void. These mere technical reservations have now been rendered innocuous by Lord Cranworth's Act of 1861.* But the law still forbids the reservation to the donor of any substantial benefits from the charitable gift; though the wisdom of the prohibition may be doubted. Its only purpose is to deter him from giving, and if the State does its duty in rendering all Charities worthy to receive gifts, that purpose ceases to be politic.

Still more open to challenge is the rule contained in the same section of the Act of 1736, that no charitable gift of land shall contain any power of revocation. Such a rule can be justified only by the necessity of imposing every possible barrier upon the endowment of Charities. Where that necessity does not exist the rule is useless. In voluntary gifts it is the general policy of law to favour powers of revocation, in order to afford an opportunity for reflection and reconsideration; and that favour is the more, and not the less, required in the case of charitable gifts, for they are peculiarly liable to be made under undue influence. "The policy of the law ought, rather, to be to leave the donor as large and as long a discretion as is possible."† In Lord Hatherley's scheme for a Mortmain law ‡ he proposed that every instrument of gift *inter vivos* to a charity should remain inoperative for a year after its execution, and throughout that year should be revocable by the donor; thus reversing the policy of 1736 by making a power of

* 24 Vic. c. 9.

† Report of Mortmain Committee of 1851, Evidence, Q. 704.

‡ Transactions of Social Science Association, 1859, p. 191.

revocation not impossible but (for a time) essential. His course is preferable to the intermediate one of simply leaving the insertion of the power, and its duration if inserted, to the discretion of the donor. For, on the one hand, the donor who most needed an opportunity for reconsideration would be the one least likely to reserve it, and on the other hand the existence of a life-long power of revocation might keep a charity in an injurious state of uncertainty for many years. It is not likely that a Charity, working under the eye of a living Founder, would become so utterly corrupt as to deserve summary suppression by him; whilst the mere possibility of summary suppression would seriously impair the present benefits of many forms of charity. Half the value of an almshouse or a pension lies in the lifelong security that it inspires.

IV.—Persons by Whom Given.

It is more likely that in this respect a State would create facilities than restrictions, that in the case of charities it would (as has occasionally been done, even in England)* suspend the rules which incapacitate some classes of persons from making dispositions of property, rather than add to their number. It is difficult, too, to see what readily definable classes of persons—from within the ordinary limits of majority and sanity—could be selected for incapacitation, either as peculiarly likely to give undesirably large sums or as peculiarly likely to give to undesirable charities. It is, however, possible that, for the protection of family property, persons who had relations of a very near degree might be altogether precluded from creating any charitable Foundation. This would simply be to elevate into a prohibition such partial restrictions as are now imposed upon charitable gifts made in India by persons "having a nephew or niece or any nearer relative," or in Georgia by a testator who leaves "a wife or issue."†

* *Infra* p. 261. † *Supra* p. 107.

V.—Persons to Whom Given.

A proposal, which it is difficult to treat seriously, has been offered, that gifts should only be permitted to be made to Charities that already exist. Such a reform would go either too far or not far enough. If the condition of our existing Endowments warns us to create no new ones, it cannot be desirable to augment the resources they are wasting. The opposite suggestion would have been more plausible—that Endowments should only be permitted for the creation of new Charities. The most important object which the State has in view in permitting endowments—that of providing a field for *Experiments*—would be at once frustrated if Founders were restricted in their beneficence to the limits of such charitable designs as have already been established.

Some reformers, like Mr. Fitch,* would make it illegal to devote any money to public objects except through the agency of some recognised body which is amenable to public control. Others propose the more moderate course of requiring that every Foundation should be examined and approved on behalf of the State before it took effect.

It is doubtless well to provide a public authority which, like the *Administration Générale de l'Assistance Publique* of Paris, can accept the gifts of the charitable for application at its own discretion; thus relieving the giver from the trouble of finding Trustees and the dangerous enterprise of planning a detailed scheme of Trusts. But to make this public authority the only channel for charitable gifts would be to cut down the number of those gifts very materially. Few Founders would have the rare wisdom and still rarer self-denial of Michael Bernard Mullins, who, in 1873, bequeathed £30,000 to establish a Convalescent Hospital at Dublin, "to be subject in all respects to the approval, control, and direction of the Board of Bequests, to the fullest extent of their legal powers."

Apart, however, from such schemes, there are some

* *Fraser's Magazine*, 1869.

restrictions on a Founder's choice of donees which deserve grave consideration. The law may prohibit certain classes of private individuals from being made the trustees of charitable gifts; or it may go so far as altogether to prohibit private trusteeships for charities.

An instance of the former course may be found in the rule of the Code Napoleon which forbids a confessor to receive any gift (whether in trust or not) from his penitent; and in the analogous suggestion which has been made in this country, to declare void all bequests for charity which are made through the minister of religion who attends the donor on his deathbed. It would, however, be both a more effective and a more convenient barrier to unfair sacerdotal pressure, to require all charitable bequests to be made at a sufficient interval before the testator's death. For, on the one hand, a designing priest will have no difficulty in securing a colleague to act as trustee for any gift which he may extort from his penitent's fears; and on the other, it is hard to deprive the testator of the opportunity of employing as his almoner a man in whose piety and judgment he puts so much confidence that he has chosen him as the guide of his last hours.

The latter course of permitting no private person whatever to become the trustee of a charitable Endowment, but requiring it instead to be given to a body politic or "fictitious person," has found many supporters.

One of the most remarkable differences between the English law of Charities and the French, relates to the constitution of the administrative owners of the endowment. In England a founder names one or more persons in whom he has confidence to act as trustees, and carry into effect his benevolent purposes. In France, on the other hand, he is restricted as to the mode of administration, just as we have seen that he is restricted as to the choice of his purposes. At either point official authority comes in. Every charitable bequest must be made to a *personne civile;* or, in other words, an "être fictif, auquel la loi reconnait une partie des droits qui appartiennent aux personnes ordinaires

et qui peuvent recevoir des libéralités." Such a *personne civile* must either be an existing official public establishment (for instance a public hospital, a parish church, or a *commune*), or it must be an establishment of public utility, created or to be created only by a decree of the Council of the State.*

Many observers have desired to see all the endowed charities of England placed in the care of Corporations; since the incorporation of the trustees, as a single fictitious person, enabled a majority to act as a quorum for the execution of leases and the performance of all other administrative acts, saved the constantly recurring expense of making a conveyance of the estates whenever a new trustee was appointed, and that of applying to Chancery to appoint one (if the founder had given no power of appointment), besides tending to prevent that confusion of the charity property with the private property of the trustee, which sometimes takes place where the trust has come into the hand of a solitary survivor.

The cost of the deed of conveyance was often considerable. The trustees of Brandon School, whose gross annual income is £57, reported in 1868 that their last deed cost them £67 10s. 7d.† And the expenses of proceeding in Chancery to obtain new trustees were often overwhelming, especially when, as sometimes happened, the Court had to find out which of an ancient group of trustees had ultimately survived the others, and then had to find out who was now that survivor's heir. Popham's Charity at Chippenham, worth only £21 a year, had to spend £120 besides the cost of the conveyance.‡ Lee's Charity, at Fittleworth, with less than £100 a year, spent £500 in a suit for this purpose which began in 1801, and was not completed till 1812.§ Happily both conveyances and suits are now rendered unnecessary by the Charitable Trusts Act of 1860,‖ which enables the Charity Commissioners to appoint new trustees

* Arnold's *Schools and Universities on the Continent*, p. 21.

† Report of Schools Inquiry Commission I., 445.

‡ Charity Inquiry Commissioners' Twenty-ninth Report, p. 1249.

§ Thirtieth Report, p. 776. ‖ 23 and 24 Vic. c. 136, ss. 2-4.

and vest the property in them whenever the gross income of the foundation does not exceed £50; and to do so even in cases of greater amount, if a majority of the existing trustees desire it. So successful has this reform been in diverting business from costly tribunals to a gratuitous one, that since 1860 the Commissioners have made 6202 orders under these sections, either for appointments of trustees or for other matters there authorised; whilst Chancery and all the other courts of concurrent jurisdiction have only made 112.* Such facilities are rendered the more important by the precautions which are now so commonly taken for securing the removal of inefficient trustees, and which necessarily increase the frequency of new appointments. In appointments by the Board, the recommendation of the old Trustees is always invited, and, except where the appointment is open to objection on public grounds, is as a matter of practice accepted.

Greatly as this reform has diminished the disadvantages of an unincorporated trusteeship, a provision still more potent has been added by the creation of an Official Trustee of Charity Lands† and of Official Trustees of Charitable Funds;‡ in whom the legal ownership of the real and the personal estate, respectively, of a Foundation may be vested, whilst all the powers of administration will still remain in the ordinary local trustees. And power has been given to the majority of any duly constituted meeting of the trustees to act as a quorum of the whole.§

These changes have not put an end to the demand for a general incorporation of Charities; as is shown by the Bill of 1857,‖ and by the Act of 1872, which empowers the Charity Commission to incorporate any Trustees who apply to them to do so.¶ But this power has only been exercised five times within the last four years; and the fewness of

* Report of 1879, p. 3.

† 18 and 19 Vic. c. 124, s. 15; cf. 16 and 17 Vic. c. 137, s. 47.

‡ *Infra*, p. 265. 16 & 17 Vic. c. 137, s. 51; and 18 & 19 Vic. c. 124, s. 18.

§ 32 and 33 Vic. c. 110, s. 12; superseding 23 and 24 Vic. c. 136, s. 16.

‖ Parl. Papers, 1857, I. 321; IV. 197.

¶ 35 & 36 Vic., c. 24, s. 1.

the applications for its exercise shows that the advantages which incorporation once possessed have now disappeared.

On the other hand, there have always been serious disadvantages in rendering any charitable Foundation a corporate body. The individual administrators are exempt from that legal responsibility to which they would have been subject had they been mere Trustees. Some act of misappropriation or of folly is committed under the common seal, and no one is amenable. This defect is so grave that whenever a Charity is incorporated by special Act of Parliament care is now always taken to impose this individual responsibility.* It is highly desirable that a general measure should be passed, to extend this liability to all incorporated charities. The absence of legal responsibility becomes, of course, most fatal in those Foundations where the corporators are the recipients as well as the guardians of the revenue—a state of things which is found in many of the older almshouses, as well as in some old grammar-schools, in which the master has been made a corporation-sole. In such, the hazards of misconduct are so great that one of the first steps in any reform of our charities should be a general dissolution of this class, if not (as Mr. Fearon desires) of every class, of charitable corporations. The absence of responsibility for acts done under the common seal is rendered the more serious by the facility with which the seal may be applied to documents informally or fraudulently—as, for instance, at a meeting of an insufficient number of the corporators.

There is a further drawback, which is connected with the renewal of the corporate body. In an incorporated Charity the new members are elected without that supervision which Chancery and the Charity Commission are so often called upon to exercise in the case of Trustees, whilst neither the Commission nor the Court has any power either to make new schemes for the Charity, if its constitution prove to be an impracticable one, or to divest its members of their trust if circumstances should require it. Where, for instance, it

* Report of Schools' Inquiry Commission, Mr. Fearon's evidence, Q. 13,370.

is proposed to concentrate the management of all the charities of a locality in the hands of a single body of administrators, this invaluable reform cannot be carried through if one of the Charities happens to be incorporated.

But beyond all these legal objections there lies a practical one, which, vague as it may appear, has been proved by the experience of the Charity Commission to be only too real. The feeling of moral responsibility becomes less strong in a man who, even if only nominally, has merged his individuality in the life of a fictitious entity, and whose acts, even if only technically, are no longer his own. If the same man be trustee of an unincorporated charity, his own name is used in every transaction, his own signature is attached to every deed, and these outward and visible symbols of his action keep alive his sense of responsibility. There is no longer any fictitious phraseology to make him stand, as it were, outside himself, and carry his doings as a corporator into an external world in whose affairs his conscience can feel no interest. This is not mere *à priori* speculation. "It has been found," report the Charity Commissioners, as the result of their actual experience, "that through the use of a common seal a veil is thrown round the decisions and acts of the individual trustees which tends to weaken their sense of personal responsibility, and hence to produce laxity of administration."*

This weakness of legal and of moral responsibility, this defect in both the coercive and the conscientious sanction, is rendered by modern observation even more evident than at the time when it was coarsely embodied in the aphorism that "Corporations have neither a body to be kicked nor a soul to be damned." Both legislators and administrators have laid the lesson to heart. "It has been the current of modern practice in the settlement of new schemes for Charities, whether by legislative or other special authority, to substitute as far as possible individual trustees for previously existing corporate bodies. This policy has been signally affirmed by the Legislature in the Municipal Cor-

* Parl. Papers, 1874, xv. 13.

porations Act (5 & 6 Wm. IV., c. 76), whereby the several Municipal Corporations dealt with by that Act were displaced throughout the kingdom from the trusteeship of the borough charities in favour of bodies of individual trustees. We may also mention the contrivance to which the Court of Chancery has found it necessary to resort, of appointing boards of managers for controlling, at least, the acts of the corporate trustees whom it is unable to remove. It is also the almost invariable practice of the Endowed School Commissioners, in framing schemes for incorporated charities, to provide for the extinction of the corporations, and the substitution of individual Trustees or Governors in their place."*

We may thus conclude that every unincorporated body of Charity Trustees is, in this country, now clothed with all the advantages that incorporation could ever have given it; whilst, on the other hand, it is free from serious drawbacks which are inherent in the working of a body-corporate. The proposal to incorporate all Charities may therefore safely be discouraged.

VI.—Time of Creation.

Restrictions have frequently been introduced for the purpose of securing such an interval between the creation of the gift and the death of the donor, as will afford some guarantee that the gift was not made in the immediate expectation of death.

Where charitable gifts are made in a last illness, they are undoubtedly subject to peculiar objection, as well on account of the effect which the disease itself may have in impairing the faculties of the invalid, as of that which the fear of death may have in awakening selfish superstitious terrors, and leading him to prefer the claims of religion to those of justice. "One flash of purgatorial fire," as Fuller says, "is able to melt a miser into charity."† When the

* Parl. Papers, 1874, xv. 13. † *Church History*, vi. 1. 265.

legendary Scotchman asked, "Should I be placed among the elect if I left ten thousand pounds for Free Kirk Sustentation?" his minister is said to have replied that it was an experiment well worth trying. The story may be a myth, but it is also a parable. The Eighty-fourth Canon of 1604, after ordering a chest for alms to be set in every church, proceeds to provide that—

"The Parson, Vicar, or Curate shall diligently, from time to time, *and especially when men make their testaments*, call upon, exhort, and move their neighbours to confer and give, as they may well spare, to the said chest, . . . knowing that to relieve the poor is a sacrifice which pleaseth God, and that also whatsoever is given for their comfort is given to Christ himself, and is so accepted of him that he will mercifully reward the same."

Similarly the Rubric in the Order for the Visitation of the Sick in 1549, 1552, 1559, and 1604, provides that "The Minister may not forget nor omit to move the sick person (and that most earnestly) to liberality towards the poor;" words which after the Savoy Conference were modified to their present form:—"The Minister shall not omit earnestly to move such sick persons as are of ability to be liberal to the poor."

Hence the Act of 1736* requires all charitable gifts of land to be made at least twelve months before the donor's death. And the Church Building Act of 1803 which, dispensing with the restrictions both of that statute and of the older statutes of Mortmain, allows any one to give five acres of land, either by will or by deed, for the site of a church or parsonage, requires that the will or deed be "duly executed three calendar months at least before the death of such grantor or testator."† Similarly, but more generally, the Irish Charitable Donation and Bequest Act of 1844‡ provides that—

"No donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments for such uses, unless the deed, will, or other instrumeet containing the same be duly executed three calendar months at the least before the death of the person executing the same; and unless

* *Supra*, p. 76. † 43 Geo. iii., c. 108, s. 1. ‡ 7 & 8 Vic. c. 97, s. 16.

every such deed or instrument, not being a will, shall be duly registered in the office for registering deeds in the city of Dublin within three calendar months after the execution thereof."

In Scotland no special rule exists, or has ever existed, for devises to charities. But they used to fall, so long as it was in force, under the general Law of Deathbed, which, indeed, is said to have sprung from a jealousy of ecclesiastical influences. This rule—which, however, was abolished in 1871 * — rendered void all gifts of landed property that were made to any one, except the heir-at-law, within sixty days of the donor's death, if he were then ill of the disease of which he ultimately died, and had not meanwhile appeared at kirk or market, or given some proof of convalescence. It is curious that no similar precaution has yet been taken in any part of the United Kingdom for charitable bequests of personalty; where it must be more necessary,† both because money is more frequently held by the ignorant classes than land is, and because the desire to keep land in a family affords of itself a very considerable safeguard. A clause for this purpose was contained in Mr. Headlam's unsuccessful "Bill to consolidate and amend the Law of Mortmain," of 1854, which proposed to enact that (except in the case of specific bequests of scientific or artistic objects), bequests of personalty to charitable uses should not be valid unless the will were executed three months before the death of the testator, and notice of it given by him to the Charity Commissioners within a month of execution (an effective provision for preventing the ante-dating of the will); while gifts by will of realty were, as now, to be almost entirely prohibited. Similarly in Pennsylvania, by an Act passed in 1855, bequests, devises, or conveyances for religious or charitable uses must, whether made by deed or will, be executed at least one calendar month before the death of the testator or grantor. And in New York, by a statute enacted in 1848, all gifts *by will* to charitable corporations must be made two months before the testator's death. In France a more imperfect protection

* 34 & 35 Vic. c. 81.

† See p. 68, *supra*.

against ecclesiastical influence is provided by the rule which prohibits a confessor from receiving anything under the will of his penitent.

In Ontario gifts of land to religious societies, whether by deed or will, must be made six months before the donor's death.*

In the State of Georgia, a gift by will to charitable uses is made void unless executed ninety days before the testator's death, if he leaves a wife or issue living. This last provision seems, like the corresponding one contained in our Indian Succession Act, 1865, to confuse the question of deathbed dispositions with that of legitim; as if it were needless to guard a testator against ecclesiastical influences except when he had very near relatives. The Indian Act provides† that "No man having a nephew or niece, or any nearer relative, shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons."

Lord Hatherley‡ proposes to require every charitable gift by either deed or will, of either realty or personalty, to be made twelve months before the giver's death, except a gift by will under the amount of £200. To all such restrictions there is of course the obvious objection that there will inevitably be cases in which they will deprive charities of many unexceptionable donations. On the one hand, a man who has made his gift in the most perfect health, may still die most unexpectedly within the subsequent statutory period. On the other hand, death may be expected, and yet not influence the gift. A testator may, and in a large proportion of cases actually does, make his will only when impelled to do it by the approach of death, and yet make it in precisely the same manner, even as to the extent of his charitable bequests, as he would have done if he had been in perfect health.

* Statutes, ch. 216, s. 19. † Section 105.

‡ Transactions of Social Science Association, 1859, p. 191.

Where the gift is by will, the strength of this objection is heightened by the prevalence, at any rate in England, of a half unconscious superstition which too often leads men to postpone making their wills until the last hour is evidently at hand. In strong men's minds, it is only the association of ideas, linking the notion of a will with that of imminent death. In weaker men, it undoubtedly often amounts to an actual belief that a man's making a will is an omen that he will soon die. A further objection, in the case of wills, to such restrictions is, that a man's "last will" is not necessarily his first one. He may have bequeathed a charitable legacy in a will made many years before his death, and then may re-make this will for collateral purposes, and reinsert the legacy. If he dies immediately after making the new will, the charity must, under Lord Hatherley's restriction, lose its legacy; for the gift, though really of long standing, is technically a recent one.

Undoubtedly there are many conditions of society in which the strength and the corruptness of sacerdotal influence are such as to outweigh all objections, and render some restriction upon deathbed dispositions imperative. Thus Archbishop Whately deposed to the Mortmain Committee of 1851, that in Ireland "we should scrupulously guard against the danger, which I know is considerable," of rash gifts made in fear of death.*

But we may fairly say that England is not, and for centuries has ceased to be, in such a state as to make these restrictions necessary or even beneficial. Our law has never imposed any check on deathbed gifts of personalty to charities; yet the cases in which any abuse that such a check would have defeated has been even suggested, have been extremely rare. Nay more, as we have seen,† deathbed gifts of land have, by a singular course of exemption, been legalised for precisely those objects which sacerdotal pressure would be most likely to favour. Yet in the seventy-six years which have since elapsed, not a single case has occurred in which any clergyman has been even suspected

* Report, p. 468.

† *Supra*, p. 68.

of abusing his influence by extorting from an invalid a devise of land for the benefit of his Church.

Mr. Shelford, a learned writer on the Law of Mortmain, says that in all his researches he found only two cases* reported in which any gift of property had been challenged on the ground of undue spiritual influence exercised by a Protestant; and that even these were gifts not to charity but to the clergyman's own benefit.†

It may safely be inferred that there exists at present in this country no denomination, at any rate of Protestants, which would be willing to see its ministers enlarge its wealth by such means. And assuredly there is no denomination whose ministers are not fully aware that any wealth, which might be obtained by such means, would be dearly purchased by the public discredit that it would entail upon themselves and upon their sect.

VII.—Time of Taking Effect.

Much has been said as to the undesirableness of sanctioning charitable gifts that are so made as to take effect only after the Founder's death. The English Statute of 1736 prohibits them in the case of land; and Lord Campbell‡ and Mr. Justice Grove§ have expressed a wish to see the prohibition extended to personalty. The law of Mississippi prohibits them in the case of land; and even in the case of personalty, if a *religious* body or corporation sole is made the Trustee of the personalty.‖

The ethical objection to such gifts we have already discussed.¶ But except where they are made in the near prospect of death, so as to fall within the dangers discussed in our last section, it is difficult to see why they should be prohibited, except for the mere purpose of imposing every possible check upon Endowments. Such a prohibition is of

* *Norton* v. *Relly* (2 Eden, 286); *Huguenin* v. *Baseley* (14 Ves., 273).
† Report of Mortmain Committee of 1851, Evidence Q. 264—7.
‡ *Life of Hardwicke.* § *Journal of the Society of Arts*, xvii. 691.
‖ Revised Code of 1857, secs. 55 and 56. ¶ *Supra*, pp. 22, 24.

course a serious check, for, as the supporters of the Act of Geo. II. foresaw, actual personal wants, and even mere feelings of self-interest, are strong enough to preclude many men from giving away in their lifetime what they would be anxious to give to charity at their death. They will be generous at the expense of their descendants, but not at their own.

But where the law of a country has rendered Endowments in general innocuous—by providing both for their efficient administration so as to counteract the 'principle of caducity,' and for their future revision so as to adapt them to the changes of circumstance—and where the particular Endowment proposed is in itself beneficial, it is surely needless to throw factitious legal hindrances in the way of its creation. There are many persons who are wise enough to plan or to select a charity with discretion, and rich enough to devote to it the reversion of a considerable sum—if only they may retain, or have adequate security for receiving, the income of that sum during their lives—who, nevertheless, cannot afford to part immediately and irrevocably with the whole, and sacrifice both principal and interest. The last Report of a valuable charitable society says, "Last year your committee mentioned that Mr. T. S. had presented a sum of £2000 to the Institute, on the condition that certain interest be paid to Mr. or Mrs. S. during their joint lives, or to the survivors of them, and that then the whole amount revert absolutely to the Institute. This amount has since been paid. Your committee will be happy at any time to meet the views of any such of their friends, and to make similar arrangements to those entered into with Mr. S." It is hard to see upon what ground such arrangements, if in other respects unobjectionable, need be legally prohibited. Why may not a man give to a Charity a post-obit bond on his own life?

This point, as well as that of revocability, is involved in the question whether charitable gifts should be allowed to be created by will. The Act of Geo. II. has, as we have seen, prohibited such devises in the case of realty; a prohi-

bition which Lord St. Leonards vainly attempted to get extended to Ireland, and which accordingly holds neither there nor in Scotland, whilst even in England it does not extend to bequests of pure personalty.

Mr. Justice Grove,* who would prohibit all charitable gifts that do not take effect in the donor's lifetime, lays stress upon the value of the donor's watchfulness in preventing them from being abused. It is true that he will no doubt feel a specially strong interest in the working of his own Foundation; and that if it has been incorporated, he will as its visitor have † special means of correcting any abuses. But no such importance should be attached to this, as to justify any special legal preference for such charities; since Foundations are usually managed with purity and efficiency during the first generation of their history, and thus the donor's vigilance is present only at the time when it is least needed.

VIII.—The Formalities.

An obvious precaution for any gifts that are likely to be challenged is to require that their execution shall not take place in secret, but that the donor shall secure the attendance of some witness who will be able, if subsequently called upon to do so, to give evidence of the genuineness of the signature, the circumstances of the gift, and the mental condition of the giver.

Thus the English law requires two witnesses to attest every will, whether it contain charitable gifts or not; and the Act of 1736 requires every deed by which land is given to a charity to be attested by two witnesses, whilst an ordinary deed of conveyance does not require any witness though in practice it always has at least one.

There can be no doubt of the propriety of requiring witnesses to all instruments by which property is disposed of; and especially to those which dispose of it to charitable uses, and are therefore peculiarly apt to cause disappoint-

* *Ubi supra.* † *Philips v. Bury* (Skinn., 447).

ment and arouse hostility. The only points that call for discussion are, the number and the character of the witnesses that should be required.

As regards number, it is undesirable to require charitable gifts in general to be attested by more witnesses than are required for ordinary gifts; except where (as in the English law of conveyances *inter vivos*) the rule for those gifts is unduly lax. But it deserves consideration whether an additional number of witnesses might not, with propriety, be required, whenever the magnitude of the gift is such as to call for special proof of the circumstance under which it was made. Thus Lord John Manners' Bill of 1845, "to alter and amend the laws relating to the disposition of property for pious and charitable purposes" * (whilst repealing the Act of 1736, so as to permit land to be given to Charities by will), proposed to provide that where any charitable gift, whether made by will or *inter vivos*, exceeded one-half of the whole real and personal property of the donor, the instrument should only take effect to the extent of that half, unless it were

"Executed in the presence of *three* credible witnesses (one of them being a medical attendant of such testator, donor, or grantor), who shall then certify on the back of every such will, deed, or other instrument or conveyance, that such testator, donor, or grantor is, according to the best of their judgment and belief, of a sound disposing mind, and fully acquainted with the contents of such will, deed, or other instrument of conveyance, and that he has executed the same freely and deliberately, without any undue solicitation or influence made to or practised upon him in that behalf."

As regards the character of the witnesses, it has often been suggested that the law should require at least one of them to be a person of such professional or official position that his presence will be a check upon the purity of the gift, and his evidence as to the donor's condition and conduct will be unexceptionable.

Thus Lord Hatherley suggests that every instrument by which real or personal property is given to charity should be attested, if a deed, by an officer of the Charity Commis-

* Parl. Papers, 1845, iv. 243.

sioners, and if a will (unless the charitable bequest be under £200) by a solicitor.* Such a witness would probably add to the instrument some special form of attestation such as is employed, for instance, in warrants of attorney, to show that he had fully explained to the donor the effect of the gift.

Little objection, beyond that of trouble and expense, can be raised to the suggestion that all deeds of charitable gift should be executed before an official witness; for they are almost certain to be drawn up by a professional man who will be aware that this formality is required, there will be time to secure such a witness, and if the deed is to take immediate effect there can be no fair objection to publicity. (It may, however, be suggested that a Justice of the Peace or a County Court Judge would be a more accessible and a not less competent witness than one of the Charity Commissioners' staff.)

But in the case of a will, there are objections to requiring an official witness. If the testator (as often happens) draws up his own will, there is great risk of his not knowing that any special witness is required. If the will, by whomsoever drawn up, is made (as often happens) in the testator's last illness, there may not be time to obtain an official witness. If (as almost always happens) the testator desires to keep secret the effect of his will, that he may be able both to make, and if need be, to alter it, without exciting reproach, he will be reluctant to resort to an official whose presence renders public at least the fact that he has given some of his property away from his family. It is part of the every-day experience of legal practitioners for a man to employ a distant solicitor to make his will, lest even the fact of its being made should become known in his own neighbourhood.

It was probably by some such reasons as these that Lord Hatherley was led to suggest for wills only the presence of a solicitor, a merely professional witness instead of an official one. But it may be doubted if anything would be gained

* Transactions of Social Science Association, 1859, p. 191.

by requiring a solicitor. On the one hand, perfectly unexceptionable gifts would often fail, because the testator made his own will and did not know that any professional witness was needed. On the other hand, when gifts were extorted by any undue influence, the person exercising it would have little difficulty in also extorting the employment of some legal friend of his own as the required witness.

The present condition of English society, as we have already said, is not such as to call for any of these precautions so urgently as to make them worth the trouble and expense they necessarily involve. Their practical value may easily be overrated. In another instance where undue influence is to be apprehended, the English law has taken the precaution of requiring official witnesses—in the case, that is, of conveyances of land by married women. No one who has seen the two Commissioners examine a wife "apart from her husband, touching her knowledge of the deed, to ascertain whether she freely and voluntarily consents thereto," is likely to have regarded the ceremony as constituting any real safeguard. Yet it adds four or five pounds to the expense of the conveyance; and the employment of official witnesses for charitable gifts would necessarily involve some similar tax upon them.

IX.—Subsequent Publicity.

There can be no doubt of the advantage of securing the utmost publicity to all the details of the constitution as well as of the working of every Foundation. It is of importance to all persons whose circumstances qualify them to seek the benefits of the Charity. It is of importance to the State, as facilitating the supervision of Charities, and enabling it periodically to estimate their wealth, and consequently judge of the need for stimulating or restraining their multiplication. It is even of importance to the administrators of the Charity, as helping to preserve information which their own archives are often too carelessly kept to preserve.

The provisions necessary for this purpose are of two kinds:—those which by extensive but temporary publicity arouse local interest, and prevent the original trustees from silently appropriating the fund before its working has commenced; and those which by a permanent though limited publicity, secure means for checking any abuses which in time may creep into its working. In other words there must be provision for Advertisement and provision for Registration.

For the former purpose, very effective provision has been made in Ireland. As far back as 1763, it was enacted by 3 Geo. III., c. 18, that every charitable gift made by Will should be published by the executor in the Dublin *Gazette*. For it was found, recites the statute, that "the pious intentions of many charitable persons are frequently defeated by the concealment or misapplication of their donations or bequests to public or private Charities in this kingdom"—a recital which one of the Secretaries to the Irish Commission pronounced to be "as true in 1861 as it was in 1763."* In the following year, 1764, the Irish House of Lords appointed a Permanent Committee on Charities, which discovered "several charitable bequests and donations, to a large amount, which had been withheld, embezzled, and concealed." Its records are still preserved in Dublin Castle, and must well deserve publication. When the Union destroyed the Irish Houses of Parliament, this Committee was replaced † by a standing Board of "Commissioners for Charitable Donations and Bequests," with power to discover charities, and enforce or revise their application. It consisted entirely of dignified officials, all of them necessarily Protestants, and most of them ecclesiastics—the Archbishops and Bishops, the Lord Chancellor and the Judges, the Provost of Trinity, the Dean of St. Patrick's, the Vicar General of Dublin, and the whole of the Dublin parochial clergy! Five were to be a quorum, but a Bishop or Archbishop must be present at every meeting. Such a Board was little

* Transactions of Social Science Association, 1861; p 148.

† 40 Geo. III., c. 75.

calculated to command the confidence of a Catholic nation; and the extensive power which was given to it * of altering the expressed intentions of Founders, inspired the keenest distrust. The Commissioners, however, worked hard. In the first thirty years of their existence they secured the due application of about £300,000 worth of charitable gifts, besides another £100,000 worth about which they were still fighting.† Their existence came to an end in 1844, when Sir Robert Peel's Ministry reconstituted them under the same name, but with a new organisation, which required at least five of the thirteen Commissioners to be Catholics, and at least five to be Protestants, and which took away their power of Revision.‡ Their only power was to recover gifts that were "withheld, concealed, or misapplied," and then to hand them over to the Trustees. They had no power to originate inquiries, or to ask for annual returns or even for suspected accounts, or to send out Inspectors, or even to administer the moneys they received. It was not until 1867 that they were placed more nearly upon a level with Lord Cranworth's English Board.

At the present day, under the Charitable Donations and Bequests Act of 1867,§ the executors of any will containing any charitable devise or bequest must, within three months after obtaining administration, publish once in the Dublin Gazette, and three times in some local paper, every charitable devise or bequest contained in the will (at the cost of the property so left to charitable purposes) under a penalty not exceeding £20 to be recovered summarily by the Commissioners in the Civil Bill Court. Moreover, copies of the papers containing such publication must be sent to the office of the Commissioners, under a penalty of £5. Any person, however, may be exempted from these penalties where the devise or bequest is of trifling value. A large sum in the aggregate has been remitted under this exemption by the Commissioners on receiving receipts from the Charities for the executors' payment of the sum bequeathed;

* *Infra*, p. 200. † Parl. Papers, 1829, iv., 195. ‡ 7 & 8 Vic., c. 97.
§ 30 and 31 Vic. c. 54, s. 19 (superseding 7 and 8 Vic. c. 97, s. 18).

737 gifts having been exempted, and 2923 advertised. The Registrars of the Court of Probate must, under a like penalty, give notice to the Commissioners of every charitable donation contained in any will entered at their office,* so that an executor has little chance of omitting the advertisement without detection. Provision has also been made for the registration of charitable gifts in Ireland by the Charitable Donation and Bequests Act of 1844, which requires all gifts of realty to Charities by instruments *inter vivos*, to be registered in Dublin within three months after their execution.†

In England, on the other hand, it is for Registration alone that provision has been made. The Act of 1736 ensured publicity as to all future gifts of lands to charities, by requiring them to be enrolled in Chancery. The value of this precaution has, however, been almost destroyed by the defective mode of enrolment which has been adopted. Mr. Edwin Field, a solicitor, whose experience and judgment give the utmost weight to his testimony, says, "The enrolment is so conducted that you cannot refer to it. It is scarcely possible to find out the trustees of any endowment that is enrolled; you could not find it out after a few years unless you knew the name of the vendor or of the first trustee. The index does not tell you in any way the purpose of the charity, or the buyer, or the place, or the parish in which it is. With regard to any particular charity if you wanted to know whether the deed was enrolled as to it or anything else respecting it, you would probably find it was utterly impossible to ascertain it from any search that you could make at the Enrolment Office. The statute therefore ensures no publicity."‡ Another solicitor, Mr. T. P. Bunting, gives it as the result of his experience that, "If you know somewhere about the date of the deed, the names of some of the granting parties, and the locality, which of course you can always get at, then after long search you are able to get it. I have instituted searches

* 30 and 31 Vic. c. 54 s. 20. † 7 and 8 Vic. c. 67 s. 16.

‡ Report of Mortmain Committee of 1844, Evidence, q. 398.

myself within the last three or four months, which have been attended with great expense and very great difficulty. In one case I think it took four or five days before we could get at it; but that was a case where information was studiously withheld. In fact, in suits relating to charitable property, vast expense is often incurred in simply getting materials for your bill, by obtaining information which ought to be patent to all the world."*

Much of the value of the enrolment is also destroyed by a plan which is often adopted of effecting conveyances to charity by means of a pair of deeds, one of which conveys the property, whilst the other declares the charitable trusts. Lord Cranworth's Act† permits the enrolment of the latter deed to suffice.

Two further but more limited provisions for registration have been made. The title deed of every school that is built, enlarged, or repaired by Parliamentary grant, is registered at the office of the Privy Council, and the Charity Commissioners are authorised to register, or even to accept the custody of, any muniments of title which the trustees of a Charity may tender to them for that purpose.‡

It is much to be desired that these enactments should be superseded by a comprehensive rule, so as to include gifts of personalty, and that, as recommended by the Popular Education Commission,§ all "instruments of Foundation and other instruments regulating charities, should be registered in the office of the Privy Council," or, still more conveniently, in that of the Charity Commissioners.‖ There is no reason why publicity should, as now, be compulsory in the case of realty only.

It may be asked whether registration should be required to be made within a certain period from the execution of a gift (even though its operation be postponed or even contingent), or only when a gift has taken actual effect. To register revocable gifts is of little value to the public, and

* Report of Mortmain Committee of 1851, Evidence, Q. 670, 687.
† 24 Vic. c. 9, s. 2.
‡ *Infra*, Part VI.
§ Report I., 548.
‖ *Infra*, p. 140.

probably would be distasteful to the donor, though it may ultimately be of convenience to him in facilitating any steps he may take for revocation. Mr. Headlam's Mortmain Bill of 1854 proposed, however, to require immediate registration—though not immediate publicity—for all charitable gifts, even though made by will, and therefore freely revocable:—

"It shall be lawful for any person to bequeath any description of Personal Estate to any Charitable Purpose, subject to the following condition:—

> That the will shall be duly executed and attested three months before the death of the Testator, and that within one month after the date of Execution thereof a notice signed by the Testator of the amount so given, and the nature of the Trust to which it is given, shall be delivered to the Charity Commissioners.

Provided always, that if the will be executed by any Person not at the time within Great Britain and Ireland, it shall be sufficient if the notice above required be sent by the Post to the said Charity Commissioners within the period of one month from the date of the Execution of the Will."

PART IV.

THE SUPERVISION OF CHARITABLE ENDOWMENTS.

"The rest, some farm the poor-box, some the pews."
—*Pope.*

"I grew rich by taking charge of the poor."
—*Le Sage.*

"There seems," says Mr. Hare, "to be a general concurrence of nearly all who have considered the subject, that whatever the value or utility of endowments at the time of their creation, the watchful eye of some independent authority is always necessary to prevent their mischief and abuse. We are taught by the universal history of endowments that their administration has never corresponded with the original design."* By a strange but familiar tendency of human nature, the Trustee comes to regard his trust as his property, and the beneficiary comes to regard his alms as his right. The Foundation gathers abuses "as a seaweed gathers damp. The carelessness of to-day becomes the habit of to-morrow. Ill-timed parsimony creates a nuisance; ill-judged liberality degenerates into a job."†

It is only to be expected that governors and trustees discharging a gratuitous office of guardianship to wards who will never come of age and call them to account, are apt both to neglect to acquaint themselves with all the details of their duties, and to discharge but laxly the duties of which they are aware. Where on the other hand, the recipients of the Foundation's benefits are at the same time its administrators (as where the masters of a school, or the almsmen of a hospital, are formed into a self-governing corporation), though there is greater incitement to economy, there is perilous temptation to dishonesty.

It is, therefore, desirable that over both species of

* Transactions of Social Science Association, 1869, p. 133.

† *Quarterly Review, XCVII.*, 420.

Foundations the State should exercise a sedulous supervision to prevent mismanagement either by negligence or by corruption; and thus, by a never-ending war against an ever-recovering foe, should counteract the inevitable "Principle of Caducity." This supervision must be of two kinds: Periodical, to afford the means of detecting abuses; Occasional, to remedy any abuses which are detected.

The periodical investigation of charity affairs by a central authority is requisite to stimulate the activity of the administrators and the economy of their administration. For the former purpose, the State must periodically inquire if the number of the administrators is being kept up by new elections to its normal standard, and with what regularity each of them attends the meetings of the body. For the latter, it must periodically inquire into the receipts and the expenditure of the Charity. The returns of actual revenue must, of course, be checked by comparison with the amount of the revenue-producing capital. Of that amount the State must furnish itself with exact information by requiring the immediate registration of every charitable gift.* In old countries, where philanthropy has run a long course before the national life has reached the stage of centralisation at which such a Register becomes possible, its contents (like the English enrolments under the Act of 1736) will cover only the later Foundations. In such a case it must be supplemented by a general inquiry into the present wealth of the earlier ones.

The history of English law reform contains few examples of more persistent and unselfish zeal than the twenty years struggle of Lord Brougham to carry out such an inquiry in this country. He brought the question before the House of Commons; he aroused the public mind by a "Letter to Sir Samuel Romilly" (in 1818) on the abuse of charities, which ran through twelve editions in six months; and by a long series of Parliamentary efforts he obtained the appointment of four successive Commissions of Inquiry, which, in the emphatic words of Earl Russell, "destroyed many flagrant abuses,

* *Supra*, p. 127.

detected the perversion of a large amount of charitable funds, and led the way to those further inquiries and those remedial measures of which we have seen the commencement and the progress, but of which the consummation is yet to come."* His Commissions were at work from 1818 to 1837, and the result of their investigations—the longest in duration and the most prolific in facts of all Parliamentary inquiries — is embodied in thirty-eight folio volumes, consisting of some twenty-five thousand pages, describing twenty-eight thousand eight hundred and eighty Charities (with an aggregate income of twelve hundred thousand pounds), and compiled at a cost of more than a quarter of a million. During the forty years that have since elapsed, these Reports have been used as the basis of all official dealings with the endowed Charities; and they have stood the test. During the last few months the present Charity Commissioners have pronounced them "a record of laborious and accurate investigation which has seldom, if ever, been equalled in the discharge of similar functions, and of which our daily experience enables us to speak with confidence."†

But though the first effectual, Lord Brougham's was not actually the first, attempt to institute such an inquiry. By Mr. Gilbert's Act of 1786,‡ returns of charitable donations, "for the benefit of poor persons," held by unincorporated trustees, had been made on oath by the parochial clergy churchwardens, and overseers. They received no authority to make inquiry from the Charity Trustees, but were simply to report their own knowledge. The returns were almost universally made, only fourteen parishes out of thirteen thousand having sent in no return; and the returns are now found to embrace almost all the returnable Charities. But a remarkable proof of the ignorance which prevails even about local charitable funds, is afforded by the fact that the returns enormously undervalued the wealth of the Charities they enumerated. In Berkshire, for example, their estimate was only one-third of the actual revenue.§

* *Recollections*, p. 170. † Report of 1879. ‡ 26 Geo. III., c. 58.
§ *Edinburgh Review*, *XXXII.* 102.

The aggregate income they returned for England and Wales was—

From land	£210,467 8 10
From personalty	48,243 10 5
	£258,710 19 3

The discrepancy between this amount and the £1,209,395 discovered by Lord Brougham's Commissioners (even after allowing for the wider scope of the inquiries of the latter), is sufficiently remarkable, and affords strong proof of the necessity of providing for the official registration of all charitable funds, and not leaving the public knowledge of their extent to the hazards of local tradition.

A Committee of the House of Commons sat upon the Gilbert Returns, and discovered in them ample evidence of the need for supervision. They report that "Many of the said charitable donations appear to have been lost; and many others of them, from neglect of payment and the inattention of those persons who ought to superintend them, are in danger of being lost, or rendered very difficult of being recovered."* It was not until 1812 that Parliament applied a remedy. In that year Mr. Lockhart succeeded (in spite of the opposition of the City Companies) in passing an Act† which required particulars of the income, capital, objects, and trustees of every existing endowed Charity, and the names of the persons holding the Instrument of endowment, to be registered with the Clerk of the Peace for the county within six months from the passing of the Act; and made a similar provision for all future Charities. A copy of each registration was also to be enrolled in Chancery. But this remarkable statute failed for want of a sanction. It provided no penalty for non-registration, and it gave no one any authority to enforce registration. Hence, two years after the time for registration had expired, the Home Secretary reported that in many counties not a single Charity had been registered, and in no county had many been. In Middlesex there had been only thirty registrations;

* Parl. Papers, 1816, iv. 329. † 52 Geo. III., c. 102.

in Cheshire, four; in Nottinghamshire, three; in the North Riding, one. All this time the Gilbert Returns were lying in manuscript in the archives of Parliament, and were not rendered accessible to the public until Brougham, in 1816, moved for a Committee, which printed them along with the results of its own inquiries. It found that "Charitable funds have in many cases been grossly misapplied; often, no doubt, from ignorance. . . . . In many parts of the country, schools richly endowed have fallen into disuse."

All these efforts culminated, in 1876, in the completion, by the present Charity Commissioners, after fifteen years of compilation, of their *General Digest of Endowed Charities* —a true Domesday Book of Foundations, replete with priceless material for the historian, the jurist, and the politician. From this Digest,* which appeared in parts from 1867 to 1876, it appears that of the 14,859 *civil* parishes in England and Wales (*i.e.*, districts upon which separate poor rates are levied), no fewer than 11,859, or 79·82 per cent., possess charitable endowments. The accessibility of charitable assistance is made still more vivid by the test of population than by that of area; for though there are thus 20·18 per cent. of our parishes which are still destitute of Foundations, they are parishes so thinly inhabited as to contain only 4·96 of our population. The gross income of these endowments (not allowing for taxes, rates, and repairs) is—

From land	£1,558,251
From personalty	640,213
	£2,198,464†

Of the personalty held by Charities, seven-eighths consists of Government stock. The lands held by them extend to 524,311 acres. (The preponderance of real over personal property in the endowments is largely due to the fact that, until within the last two hundred years, land and houses

* Parl. Papers, 1877, xxvi. 16, and lxvi. 17. The statistics given in 1875 (xx. 16) are superseded by these.

† It would seem from the subsequent figures that the amount is £3 less than this.

were the only permanent forms of property; the only forms, therefore, that a Founder would care to give. The absence of accessible investments, such as the Stock Exchange now affords, is vividly illustrated by some of the old directions about the surplus income of Foundations. In one public school it was to be placed in an iron coffer. In another (Shrewsbury) it was to be placed in an iron box under four locks, and to be taken out from time to time to be spent in building houses, and the like. At Burford, two cottages were conveyed in 1546, upon Trust "to take the rents and (after repairing the cottages) to put the residue into a common box, to be reserved until any payments of fifteenths should be levied.")

The localities of the Charities are classified as follows:—

London and Westminster	£228,764
Other localities	1,314,914
Irrespective of locality	654,783
	£2,198,461

(But in this classification all Charities administered by the City Companies are treated as situate in London, without reference to the locality where the income is spent.)

These incomes are devoted to the various forms of charity in the following proportions:—

Education	£666,863
Apprenticing and advancement	87,865
Clergy and lecturers...	90,843
Church purposes	112,895
Nonconformist Churches and Ministers	38,832
Parochial and other public uses	66,875
Almshouses and Pensions	552,119
Medical Hospitals and Dispensaries ...	199,140
Distribution amongst the poor	383,029
	£2,198,461

Yet even these vast returns are not exhaustive.

(I.) They include no estimate of the prospective increment in the lands let by the Charities upon building and other leases; nor of the value of the lands kept 'in hand' for occupation as Charity premises. The importance of even the latter omission is illustrated by the Commissioners'

statement* that "£280,000 was, a few years back, paid by a railway company for property *in hand* belonging to St. Thomas's Hospital; £90,000 by Merchant Taylors' Company for only a portion of the property in hand belonging to the Charterhouse; and a short time ago the value of the land and buildings which were occupied for the purposes of a single charitable foundation in the City of London were estimated at a sum exceeding £500,000."

(II.) They are only co-extensive with the jurisdiction of the Commissioners, and therefore do not include—

1. The Universities and their Colleges.
2. Eton and Winchester.
3. Cathedral Foundations.
4. Friendly Societies and Benefit Societies.
5. Institutions wholly maintained by voluntary contributions.

(III.) Besides the new Charities which every year brings into existence, it is probable that even when the Digest was made it failed to include all that legally fell within its scope. The Commissioners state that, "The frequent recurrence of cases in which the existence of Charities of long standing has only recently, and often accidentally, become known to the Commissioners, leads them to believe that a considerable number of these charities may have hitherto escaped their notice." Two remarkable instances of such discoveries, abundantly showing the imperfectness of our official information about Charities, are cited by Sir Arthur Hobhouse, who mentions that in 1868 the Commissioners learned for the first time the existence of two old Foundations of considerable importance, one possessing an endowment of £1000 a year, and the other of £100,000 capital.† Of the 8390 Charities, previously unrecorded, which have been registered by the Commissioners since they took office —an average of more than three hundred a year—only 4805 seem to have been created since the completion of the Reports of Lord Brougham's Commissioners, so that nearly

* Parl. Papers, 1877, lxvi. p. 23.

† *Characteristics of Charitable Foundations*, p. 26.

half of them are old ones which had escaped notice in all former inquiries.

The present Commissioners have reported that "the means at our disposal for ascertaining the particulars of newly-created Charities, are limited and uncertain. Advantage might result from imposing on all the persons charged with the execution of the trusts of new charitable Foundations, the duty of reporting them to our Board, and also from transferring to our office the enrolment of charitable settlements of land, which are now registered in the offices of the Court of Chancery."*

Comparing the statistics of the 1861-76 Digest with those of the 1818-1837 Reports, the Commissioners find that the increase in the personalty held by Charities is £12,947,200, whilst the area of Charity lands has increased thus:—

	Acres.
1861-76	524,311
1818-37	442,915
	81,396

There is an increase in the gross income of Charities of no less than £999,231, which is thus divided:—

Charities reported by 1837	£524,039
Old *un*-reported Charities	248,240
Charities since founded:	
1338 by Deed	111,033
3467 by Will	115,919
	£999,231

Hence more than 52 per cent. of the increase of income belongs to Foundations which were recorded by Lord Brougham's Commissioners, and must chiefly arise from improvements in the value of their property, whilst about 25 per cent. belongs to Foundations which should have been reported to them but were not, and nearly 23 per cent. is the creation of more recent Founders. This 23 per cent. constitutes more than one eleventh of the whole charity income of the country, as reported in the Digest; a note-

* Parl. Papers, 1859, xii., p. 3.

worthy proof that the introduction of an active system of supervision and revision has served to stimulate, instead of repressing, the zeal of Founders. This becomes still more manifest if we consider that a large portion of the other ten-elevenths of income consists of unearned increment which has accrued since the foundation of the older Charities, and consequently that the actual sums originally given by the Founders before 1837 cannot really have been even tenfold as great as those given since 1837.

The General Digest of 1876 thus showed a total income of about £2,200,000. Inasmuch, however, as more than fifteen years have elapsed since the inquiries were completed upon which the earlier portions of the Digest are based, during which interval many new Charities have been created, and as the income of many largely endowed Charities is continually on the increase, the Commissioners, in a letter to the Lords of the Treasury,* dated May 16th, 1879, estimated that "the present amount of the income of the Charities may be taken to be little short of two and a-half millions."

The contents of such a Digest of Charity property afford of course abundant data for checking from year to year the accounts which the Charities may give of the income which they have actually collected and administered. It is of the utmost importance that the State should insist upon the regular publication of such accounts, and the submission of the annual balance-sheets of all endowed Charities to some central authority. Publicity is a cheap and efficient substitute for official investigation, as gas-lamps do more than a policeman for the nocturnal protection of a street. *Vivre en plein jour* is a rule of political as well as of physical health. The anticipation of having their accounts examined renders the administrators accurate and economical. The accounts themselves disclose much information which is of great value to those who reside in the neighbourhood and are interested, whether on personal or public grounds, in the working of the Charity, and which other-

* Parl. Papers, 1879, No. 272, p. 16.

wise they could with difficulty obtain. That information, moreover, is of equal value to the State, as well for the purpose of constantly correcting its general statistical information, as for that of pointing out the particular charities in which defects, either of management or of constitution, call for official interference. Upon these principles Parliament was led to compel the Trustees of Turnpike Roads to disclose their accounts. When they did so the balance-sheets revealed such a picture of carelessness and corruption, that it was calculated that one-half the debts of the roads would have been discharged before that time had the Act been passed twenty years earlier.* Upon the same principles it was required by the Charitable Trusts Acts of 1853 and 1855† that the trustees of all Foundations should keep regular accounts and should file an annual statement of their income and expenditure, and the debts due to and from them.

Beneficial as this obligation has undoubtedly been, its efficacy would have been far greater had a summary remedy been provided for enforcing its observance. The Reports of the Charity Commissioners contain repeated complaints of the difficulty of obtaining the accounts, and of the incompleteness of those which they obtain.‡ The Reports of 1878, 1879, and 1880 show that whilst 37,000 returns should be sent in annually, the number actually received has never yet reached 25,000.§ The returns which are most likely to be withheld are of course exactly those which it is most important to supervise. At present the Board's only remedy is the cumbrous one of applying to Chancery to commit for contempt of Court any Trustees who withhold their returns. In 1879, Lord Beaconsfield's Government proposed by their "Charity Expenses and Accounts (No. 2) Bill," to empower all Courts of summary jurisdiction to make an order for the delivery of any return, and to enforce it as a summary order under the Summary Jurisdiction Acts.

* Hansard lxxxvii., 1133.

† 16 and 17 Vic. c. 137, s. 61; 18 and 19 Vic. c. 124, s. 44.

‡ See, for example, Parl. Papers 1865, xv. 4; and 1866, xxiii. 3; Report of Popular Education Commission, Evidence, Q. 3813. § In 1877, 18,917.

A further defect in the system lies in the absence of any provision for dealing effectively with the returns that are sent in. The Commissioners have not adequate rooms or an adequate staff for effecting a thorough examination of the accounts, and they have no readier mode of checking any mismanagement which their examination discloses, than the expensive process of an Information by the Attorney-General. Their Report of 1878 suggests that a great improvement in the administration of many charities might be effected if the Commission were empowered to send one of its Inspectors to audit the accounts of any suspected Charity, in the same manner in which Poor Law accounts are audited. Moreover no special provision is now in force for giving the accounts a local publicity in the neighbourhood immediately interested in them. A man who wishes to acquaint himself with the actual working of the Charities of his district must either make a visit to London to inspect the original returns deposited with the Charity Commission, or must go to the expense of having "office copies" of them made for him. The Charitable Trusts Act of 1853 provided for this by two clauses which unfortunately were repealed in 1855. It required one copy of every return to be deposited either in the local County Court office, or with the Clerk of the Peace, for public inspection; and it empowered the Commissioners to make orders for any further publication of the returns that they might deem fit.*

In addition to all these provisions for a general and periodical Supervision of endowments, the State must also, as we have already said, provide a tribunal for that occasional and individual Supervision which is involved in remedying the abuses or removing the difficulties which may at any time arise in the working of any particular endowment.

The business of such a tribunal will probably consist in appointing and removing the administrators of Charities, and in disputed cases their officials and beneficiaries, in

* 16 and 17 Vic. c. 137, s. 61; 18 and 19 Vic. c. 124, s. 44.

compelling them to discharge their trusts, in sanctioning any extraordinary transactions—such as sales or compromises—into which circumstances may compel them to enter, in providing schemes for the employment of their surplus funds, and in construing any ambiguities in the directions of their Founder.

The peculiar importance of having some accessible and economical tribunal for this last purpose must be especially insisted upon. On the one hand ambiguities are peculiarly apt to occur in charitable bequests and devises from the vagueness which often exists in the testator's own mind as to the character of the future institution which he wishes to found, or the name of the existing one which he wishes to benefit. On the other hand there is not the same need, as in the case of gifts to individuals, of having the gift interpreted with the utmost accuracy of judicial acumen. For there is no existing expectation which a misconstruction might disappoint, and the utmost misconstruction could only result in benefiting, instead of the charity intended, another cognate one—a much slighter deviation from the testator's intention than if another individual was benefited instead of the one whom he intended. It is more important that charitable gifts should be interpreted cheaply than that they should be interpreted correctly. A remarkable instance of the costly interpretation of such ambiguities was afforded a few years ago by the litigation respecting Lord Henry Seymour's bequest to "the hospitals of London and Paris," which involved the three interminable questions: What is Paris, what is London, and what (in French and English) is a hospital?

The tribunal established for these various species of Charity business should satisfy four conditions. It should be accessible with little trouble or expense; it should be skilled in the topics likely to come before it; and it should be professional, its duties having the first claim upon an ascertained portion of its members' time, so that its business may not be left to the chances of their leisure. These three requisites it may perhaps be said to need only in common

with all other tribunals; but there is a fourth which is not called for in tribunals which exist to protect the rights of definite individuals. The indefinite and public character of Charities renders necessary some public provision that that protection, whenever needed, shall be invoked. Where there is no individual whose interest it is to redress an abuse, there should be an official whose duty it is to do so.

The extent to which Charity Funds may be misused without exciting any spectator to active opposition, is remarkably illustrated by a century and a-half of the modern history of the Hospital of St. Cross. It was founded in 1151; and as early as 1332 most of the revenues were appropriated by the Master to his own use, leaving but little for the purposes of the charity. This fraud, however, was checked by William of Wykeham; whose action, on an appeal to Rome, was confirmed by the Pope. In 1576 the Master again attempted the same thing, but an Act of Parliament was obtained to check him. In 1696, on a third attempt, the Master succeeded in effecting an agreement with the other corporators and the Visitor, by which he was allowed to retain for his own use all the revenues, except the comparatively small sum required for the repairs of the building and the support of the almsmen. "A more barefaced and shameless document"—to use the words of Lord Romilly's judgment—"could not well be framed, nor could a more manifest and probably wilful breach of trust have been committed."* But it remained in force for a hundred and fifty-three years, until the Attorney-General took proceedings in 1849 against Lord Guildford, who had held the office of Master, on these profitable terms, since 1808. Another remarkable instance of maladministration is afforded by Bp. Pudsey's Hospital at Sherburn, near Durham, which was founded under Henry II. It was largely augmented by subsequent benefactors, and yet when an inquiry took place in Elizabeth's reign, it was found to have undergone such extensive depredations that its remaining income was insufficient for its working.†

* *Att-Gen.* v. *St. Cross Hospital* (17 Beav. 464).

† Parl. Papers, 1854, xv. 121.

It is not safe to leave the matter to local public spirit. The original constitution of a Charity is generally too little known in its district, and its abuses are often too convenient, for much public feeling to be aroused. And even when an abuse is recognised and disapproved, there is a probability that, if it be of recent origin, its critics will expect that time will mend it; whilst, if it be an old one, they will be too familiar with it to think it worth attack. It must also be remembered that, even where Charity abuses have aroused keen local hostility, a considerable degree of courage is required to transmute the feeling into action. The administrators of local Charities are usually prominent men in their district, who cannot be attacked with impunity. "In one small parish in Yorkshire the clergyman diverted the income of a charitable institution, amounting to £1000 a year, from its original purpose; but being not only a clergyman but a magistrate, and having monarchical power in his parish, no no two persons in the parish could be found to petition Chancery."* Much of the valuable information which has been given to the English and the Irish Commissioners has only been given because it was known that the Boards would conceal the name of an informant, and protect him from incurring local obloquy by his public spirit.†

Let us see how far the English law adopted these principles. For every incorporated Charity, or "Eleemosynary Corporation," it provided a supervising tribunal in the person of a Visitor—an office which devolved upon the

* Hansard, xxi. 1757.

† "They must," said Brougham of his Inquiry Commissioners of 1818, "be persons not only of incorruptible integrity, but of a stern disposition, and inaccessible to the cajolery which oftentimes shuts the eyes of those whom grosser arts would assail in vain. They must be easy of approach to all accusers —never closing their ears to suggestion or information because it may proceed from spiteful or malicious motives, or may denounce abuses too enormous to be credible, or accuse parties too exalted to be suspected, not even rejecting the aid of informers who may withhold their names,—as well aware that their office is to investigate and not to judge, and that anonymous, or interested, or malignant sources may still supply the clue to guide inquiry. In a word, their propensity must be to suspect abuses, and lean towards tracing them; their principle must be that no man who complains of an evil is to be disregarded, be his apparent motives what they may." (Parl. Debates, xxxviii. 608.)

Founder and his heirs. This tribunal eminently satisfied our requisite of accessibility; but it was not skilful, it was not professional, and no official had any special duty to put it in motion. The Visitor might, indeed, take the initiative himself, if the circumstances suggested it to him to do so; but there was no special probability of his becoming acquainted with the Charity's circumstances. Hence his office in most cases sunk into utter uselessness. It became, indeed, worse than useless. For since it was a settled doctrine of Chancery to leave Charities to the jurisdiction of their chartered Visitor, except in cases of the misapplication of their property, it followed that, by an unhappy paradox, the means which had been taken to secure the facile administration of justice, became instead so many barriers to its administration. Hence it was found by Lord Brougham's Committee of 1818, that "Many great neglects and abuses exist in Charities which have special Visitors. Indeed, the worst instance which we have met with belonged to that class—an instance in which no visitatorial power has been exercised until recently, although the malversations have existed for many years." And similarly a Committee of 1835 * was informed by one of the Charity Inquiry Commissioners, that the Visitors, "in almost every instance, were not acquainted with the extent of their powers;" and that, "in most cases, they are a burden and inconvenience to the Charity, because the Visitors, being exempted from the jurisdiction of the Court of Chancery, are not subject to any control as to the internal management of the Charity in any respect; and it frequently happens that the advantage which might be derived from the visitatorial power is wholly lost, because Charities subject to it are not at all looked into by the special visitors." The Reports of Brougham's four Commissions showed that, in a large majority of cases, the duties of the Visitor had for years been neglected.

Where, however, there was no visitatorial jurisdiction—as in the case of all unincorporated Charities, and in the case

* Parl. Papers, 1835, vii. 631.

of even incorporated ones if the question were one regarding the misapplication of property—there jurisdiction was exercised by the Court of Chancery. This tribunal had advantages over that of a Visitor, in its possessing the requisites of being skilful and professional, and in the fact that a special functionary, the Attorney-General, had the right and duty of bringing Charity abuses under its notice. But unlike a Visitor, it could not act of itself; nor could anyone, without great expense, put it into action. The Visitors' court might be held locally, informally, promptly. Chancery could learn nothing but by affidavit, could sit only in London, and might protract a suit for years. The Schools Inquiry Commissioners found Berkhampstead Grammar School still in Chancery, after having been there for a century and a-quarter. It had undergone "three decrees, five Master's reports, and fourteen orders in Chancery." It is not surprising to learn after this that "the buildings are in bad repair, and the school in a very languid condition."* At Bosbury a suit to remove the master of the Grammar School, to get an account, and to appoint new trustees, lasted twenty-three years, and cost £1171; the school endowment being only £98 a year.† At Stoke Prior,‡ a charitable annuity of £10, payable by the Grocers' Company, fell into arrear; a Chancery suit was instituted to recover the arrears, and proved successful at a cost of £359 12s. 6d. In the great suit about the Ludlow Charities (*The Attorney-General* v. *the Corporation of Ludlow*), the cost of both sides amounted to £20,929. Foxe's Almshouses, in that town, possessing an income of £11 a year, became the subject of a suit in which £1015 was paid as costs.§ The expense was equally great in suits merely administrative, where no hostile litigation was involved. At Ledbury, out of £9000 borrowed for the improvement of St. Catherine's Hospital, £3974 7s. 9d. was spent in obtaining leave to raise the

* Report I. 464.

† Thirty-second Report of Inquiry Commissioners, Part 2, p. 95.

‡ Twenty-sixth Report, p. 655.

§ Popular Education Commissioners' Report, VI., 505.

loan.* In another case,† to get £62 6s. 7d. out of Court, costs were incurred to the amount of £48 19s. 7d.

Such expenses, of course, made all appeal to Chancery suicidal for small Charities. It was calculated by Mr. Nassau Senior, that a Chancery suit must annihilate any Charity of £30 a year or less, must reduce one of £60 a year by one-half, and one of £100 a year by one-third. Now, of the 28,880 Charities which were recorded by Lord Brougham's Commissioners, the yearly income of

13,331 was under £5.
4,641 between £5 and £10.
3,913 between £10 and £20.

21,885 under £20.

Nearly six thousand had an income of less than one pound. The great majority of our Charitable Foundations were thus practically beyond the pale of justice. Many of them, consequently, were misapplied, or forgotten, for want of means to enforce the trust. Many others became lost for want of means to appoint new trustees. Many others had to retain their property in unprofitable forms, for want of means to effect sales or leases. Rent charges fell into arrear; trespassers took possession; lands were underlet; houses sank into decay for want of funds to repair them.

Again, in cases of alleged abuse, the Attorney-General's official initiative proved to be of doubtful value. On the one hand, he could seldom be induced to act unless some individual undertook the duty of "Relator," at the hazard of paying both sides' costs if he failed, and of having to wait some years for his own if he succeeded.‡ On the other hand, he gave his fiat to Relators without any effective guarantee that they were not acting from malice or for lucre. "When I," said Lord Romilly, "was first called to the bar, the number of informations was enormous; it was a mere trade. Persons [attorneys] used to find out defects in the administration of a Charity, and then file an information, for the mere purpose of getting the costs of the

* Popular Education Commissioners' Report, IV., 353. † *Ibid.*

‡ *Infra*, p. 161; and see Sir Samuel Romilly's speech in Hansard, xix., 516.

proceeding paid out of the estate, though the Charity could not benefit by it at all."* "Several instances," reported the fourth Inquiry Commission, "have been brought to our notice, in the course of our inquiries, in which the funds of Charities have been subjected to enormous expense by proceedings carried on evidently with a view to costs rather than to the benefit of the Charity, and which would never have been instituted had the Attorney-General exercised an effectual superintendence."†

Sir Samuel Romilly attempted to reform the Chancery procedure by the introduction of a new and summary remedy on Petition.‡ But the measure was robbed of much of its efficacy by the Court's repugnance to adopt a summary procedure. Lord Redesdale, when called upon to apply the Act, declared §—"I have a fixed and rooted objection to any rash alterations of established laws, because I am thoroughly persuaded that, generally speaking, such alterations lead to mischief. They are generally ill understood, precipitately undertaken, and loosely expressed; and that which the wisdom of ages has contrived to have clearly described, is confused by the words of an Act of Parliament, often extremely difficult to interpret."

It was clear that an entirely new tribunal must be created. In 1835 a Committee of the House of Commons recommended the creation of a permanent Board of Commissioners, "to superintend and control the administration of all charitable property;" and Lord Brougham, in the same year, introduced a Bill to create a "Board of Supervisors of Charitable Trusts," with powers both inquisitorial and judicial. The question then remained at rest till, in 1843, Sir George Grey introduced a Bill, which he withdrew on the assurance that the Government (Sir Robert Peel's) would bring in a measure of their own. Accordingly, in the next ten years successive Chancellors introduced ten several Bills for a new

* Report of Schools Inquiry Commission, Evidence, Q. 13,446.

† Thirty-second Report, Part I., p. 6. Cf. Report of Schools Inquiry Commission, Evidence, Q. 13,292.

‡ 52 Geo. III., c. 101.

§ *Corporation of Ludlow* v. *Greenhouse* (1 Bligh, N. S., 49).

tribunal, or for new powers to existing functionaries—those of Lord Lyndhurst in 1844-46, Lord Cottenham in 1847-50, Lord Truro in 1851-52, and, finally, Lord Cranworth's successful measure of 1853, which became the Charitable Trusts Act.* It created a Board of Charity Commissioners for England and Wales, with a staff of Inspectors. It gave them power to inquire into all Charities, summoning witnesses and administering oaths; to advise the administrators; to sanction improvements, leases, exchanges, mortgages, sales, and compromises; to remove Charity officers; and to veto all informations by private relators; and it created official Charity Trustees. It also gave the County Courts and the local Bankruptcy Courts the jurisdiction of Chancery in the case of Charities with incomes not exceeding £30 a year.

Seven years later Mr. Lowe added to these investigatory and administrative functions a judicial power. He carried the Charitable Trusts Act of 1860,† which conferred upon the Board the power to appoint and remove Trustees, and to make cy-pres‡ schemes for Charities; though leaving Chancery in possession of concurrent jurisdiction. The power was, however, to be exercised only in cases of Charities with incomes of less than £50, except upon the application of a majority of the trustees.§ This restriction, which was an amendment of Mr. Henley's, seriously impairs the value of these powers. It was undesirable to make any local initiative, whatever it might be, essential to the action of a department of the Executive Government, especially as all orders which the clause enabled the Commissioners to make were subject to appeal to the Court of Chancery. The Trustees of charities are usually men of too much influence in their neighbourhood, and the familiar abuses of a Charity are usually too convenient, for ordinary men to have the courage to challenge them.‖ If an abuse needs to be remedied, the Commissioners should be able to remedy it spontaneously. The function of police is their most

* 16 & 17 Vic., c. 137. † 23 & 24 Vic., c. 136.
‡ *Infra*, p. 200. § *Infra*, p. 185. ‖ Cf. p. 146 *supra*.

essential function. At present, the utility of their greatest power is made dependent on the chance of some private individuals venturing, at personal inconvenience, to solicit its exercise;* whilst it is further made necessary that these individuals should be local administrators of the very Charity upon which the power is to be exercised.

The ten years' struggle to establish this Board had been a severe one. When Lord Lyndhurst made the first attempt, the City Companies were violent against it. The Society for the Propagation of the Gospel petitioned against it. Lord Campbell boasted that there was one petition in favour of the Bill, and "a vast number, an absolute shower, of petitions against it."† The Bishop of London protested against it, on the ground that even when the Bishops "were not officially or legally the visitors of an educational Charity, they were bound by their duty to act as such; and no provision ought to be agreed to which would interfere with the influence which the Church had over Charities established for educational or Church purposes." Lord Cottenham denounced the "jurisdiction and the meddling of the irresponsible Commissioners who are to be appointed under this abominable measure."‡ The Bill swept away a mass of lucrative litigation, and the lawyers opposed it. It was, after the Poor Law Amendment Act, the greatest step of the century in centralisation, and the advocates of 'vestralisation' opposed it.

The experience of a quarter of a century has disarmed all opposition. The jealousy with which the interference of the Board was at first regarded has now altogether disappeared. Probably no other permanent Commission has

* "Anger," the Charity Commissioners say, "is sometimes excited among the least intelligent and most violent part of the community against those who take part in diverting doles to better objects. This liability is apt to deter residents, and particularly persons in the position of a clergyman, from coming forward to abate the mischief; and it is not very surprising if, under these circumstances, a public board, such as ours, is called on to interfere." (Report of 1868-9, p. 41.)

† Hansard, lxxxv., 1250.

‡ Hansard, lxxxvi., 770. His own measures aimed only at facilitating the action of Chancery.

ever proved so completely successful.* Mr. Lowe calls it "a judicial discovery."

The work of the Board is vast, complicated, and delicate. The capital whose administration they superintend, represents some eighty millions of pounds; the trusts whose execution they direct are of almost infinite variety in history, purposes, and form; the bodies whom they are expected to control are multifarious, jealous, and powerful; and the interests with which they come into collision are strengthened by a thousand ties of family, locality, and party. To devise such functions was no slight achievement of statesmanship. To have successfully exercised them is the height of administrative triumph.

The Commissioners make about two thousand Orders yearly, besides disposing of a still larger number of matters by correspondence or by conversation, without any formal Order. They exercise a conciliatory jurisdiction, to veto litigation; and the extraordinary diminution in Informations has shown to what an extent speculative solicitors had previously made Charities a hunting-ground for costs.† They have a hortatory jurisdiction,‡ to advise on difficulties; and in the very first year of their existence, eleven hundred applications were made for its exercise. Their supervisory jurisdiction§ may be invoked without cost or formality, by any one who will send them notice of any abuse he has discovered; and the consequent inquiry they institute is equally informal. It is held locally, by an Inspector, and with a Benthamic freedom of testimony. No witness is incompetent; no evidence is excluded. Their enabling jurisdiction‖ gives great facility for the economical management of Charity property. By their system of public notices, they secure a hearing for all local opinions and all local factions; whilst by their connection with the House of Commons, through the one honorary Commissioner, they are kept in constant alliance with the enlightened public feeling of the nation at large. Their revisory juris-

* See Lord Hatherley's remarks in Hansard, cxcvii., 1749.

† *Supra*, p. 149. ‡ *Infra*, p. 267. § *Supra*, p. 151. ‖ *Supra*, p. 151.

diction,* narrow though it is, affords a simple and economical mode of adapting the more obsolete charities to modern needs.

With a view of bringing the advice and the supervision of the Commissioners to bear more directly upon the local administrators of Charities, a system of stipendiary Trusteeships has been suggested. The Commission might be empowered to send one of its Inspectors to act, either occasionally or generally, as a Trustee of any Foundation, along with the existing Trustees, so as to be a check upon their incompetence or indolence. (A precedent was given when the Assistant Poor Law Commissioners were empowered to attend the meetings of any Board of Guardians, and aid it with their widely-gathered experience.) Such a plan may be desirable as a temporary resource; but a far more extensive reform may be suggested, which would work with greater efficiency, and without the disadvantage of a constant collision between local and central authority. We must rely on metropolitan authority for supervision, but we must beware of trusting to it for motive power. To secure loyal and hearty administration of a charity, we must not look to Government officials in London, but to local energy, local zeal, and local affection.

The metropolitan supervision of Charities would be rendered far easier, as well as far less necessary, if their administration were always in the hands of intelligent and experienced Trustees. To secure this it is necessary that the interests confided to the trustees should be sufficiently important to attract the energies of men of prominent public position, and that the labour of the Trusteeship should be reduced, as nearly as possible, to limits which will render unnecessary the addition of inferior coadjutors. Both these points would be attained by massing the administrative bodies, so as to place all the Foundations of a large district under the charge of a single group of managers. This principle has been carried out in several London parishes, by local Acts; and it is adopted in most continental

* *Supra*, p. 151.

countries, the Charities being generally administered by the municipality of a town, or the authorities of a commune, acting under the control of the Minister of the Interior,

Such a course, by offering a wider sphere of work, will thus secure a better class of administrators, and will also attract greater public attention to their proceedings; whilst, by enlarging their number, it will prevent Trusts from stagnating in the hands of a clique or family. But it will also have an even greater advantage, in its securing uniformity and correlation in the management of the different Charities. Their administration by a single body prevents the overlapping of their benefits, at the same time that it saves much of the time of the administrators. Questions of principle are fought in one struggle, instead of going through successive contests before a dozen different knots of Trustees; and accounts are kept with an uniformity which facilitates local inquiry and metropolitan supervision.

Such a Board would probably appoint separate sub-committees for the separate Charities (or at least for all small groups of Charities closely allied by locality or by purposes), who, under its authority and control, would conduct all matters of detail; and who would, probably, be empowered to elect into their number, for this purpose, coadjutors possessing local information, or representing local interests, though not qualified for the higher duties of the central Board. But for such sub-committees, the very magnitude of the number of members of the Board would be apt to lead to the neglect of its duties. Each man would rely on his colleagues to do his share of the work. So the affairs of Bethlem Hospital, which had about sixty governors, were found, upon inspection, to be managed by four of them;* and Mr. Bouverie found that Queen Anne's Bounty, with its numerous and dignified body of governors, was practically left in the hands of a secretary and two clerks.†

Suggestions for the constitution of such Boards, either for educational Charities, or for Charities in general, have been

* Report of Popular Education Commission, vi. 511.

† Hansard, clx. 906.

made by Mr. Hare, in his evidence before the Popular Education Commissioners,* by those Commissioners themselves,† and by the Schools Inquiry Commissioners.‡ The establishment of Provincial Boards of Education formed an important part of the proposals made by the last mentioned Commissioners for the reform of Endowed Schools; but Mr. Forster was not able to deal with this point in his Act of 1870. The proposal still remains to be brought before the attention of Parliament.

The difficulty in connection with the creation of provincial Charity Boards will be to determine the constituency by which they are to be elected.

Boroughs of large size would probably desire the exclusive control of their own Charities. A Town Council is usually too fluctuating a body to be fitted for a duty requiring so much special knowledge, though it might safely be allowed to appoint the elective members of a Borough Board of Charities. Or Mr. Hare's suggestion may be adopted, by which those members would alternately be appointed by the Mayor and by the Borough Board itself. For the County Board, the elective members might be appointed alternately by the Quarter Sessions and by the Board itself. It is undesirable to place the election in the hands of a popular constituency, such as the ratepayers, for such constituencies often feel more interest in the maladministration than the good administration of a Charity. They delight in doles, without reference to their economical results, and in cheap education, without reference to its efficiency or completeness. In many cases, too, a Charity Trustee wields valuable rights of patronage, he can nominate to almshouses or schools; hence it is undesirable that he should himself be the nominee of those who may seek these nominations from him.

But on both Borough and County Boards the *ex-officio* members would be an important element; embracing such persons as the Lord-Lieutenant, the Chairman of Quarter

* See his remarkable Letter on the Salisbury Charities, in the Commissioners' Report, VI., 473.

† Report I., 545.

‡ Report I., 629—636.

Sessions, the Archdeacon, the Clerk of the Peace, the senior surgeon of the local hospital, the Chairmen of Boards of Guardians, and all ex-Mayors. The value of *ex-officio* Trustees lies in the security they afford for a continuous succession of intelligent administrators; thus obviating the difficulty which arises from the fact that among the "personal" Trustees there is apt to be a constant survival of the un-fittest, because the most experienced, as being usually the oldest, will probably be the first to die. But whilst looking to them to direct, we must beware of relying on them to perform, the general work of the Trust. The professional position which is the guarantee of their competence, is at the same time evidence of an exhaustive demand upon their time. The Irish Endowed Schools Commissioners pronounced it to be a fundamental defect in the constitution of a school, that any large number of its administrators should be "named *ex-officio*, as holding offices of dignity and responsibility, and so charged already with onerous duties, the performance of which occupies nearly all their time and thoughts. Persons thus circumstanced cannot pay such continuous and regular attention to the business of a Charity as would be required for its efficient management." * They found that "Ignorance of the objects of endowments is by no means uncommon, even among the persons employed in administering their affairs. Many instances came before us where Governors and Registrars confessed to an almost total ignorance of the charters and other documents declaring the objects and past history of their Charities. It is true that this kind of knowledge can only be acquired at the expense of considerable labour; but it is absolutely essential to the managers of an institution, and we believe that the want of it is commonly excused, because Boards of Governors, in general, consist of persons not one of whom could reasonably be expected to take the pains to master the contents of registers and account-books. Trustees, the greater part of whose time is occupied with their private business, find it impossible to acquire this kind of knowledge, and are

* Parl. Papers, 1857-8, xxii. 261.

obliged to guide themselves by the routine of a practice supported by the authority of former trustees and officers."* Lord Cranworth once said that nine-tenths of the abuses in charities resulted simply from ignorance; the Trustees not being acquainted with their property, or with their trust-deed.

A measure so comprehensive as the institution of these Provincial Boards of Charities could only be carried when Parliament had leisure for full discussion of both its principle and its details. But a preliminary reform may be suggested, of so simple a character as to admit of its being readily enacted, which nevertheless would add a material guarantee for the efficiency of all future Trustees of Charities.

For the successive enactments by which, as we have seen,† unincorporated charitable trusteeships have been gradually clothed with all the advantages that incorporation could have given them, might well be now consummated by a general compulsory measure. From the ignorance of the Trustees, or the professional interest of their legal adviser, it too often happens that no use is made of the facilities which the Legislature has provided. The appointments of new Trustees are "still very commonly"‡ made by the old and costly method of a deed of conveyance, instead of a gratuitous Order under the seal of the Charity Commission. The Board say that, in cases of realty, the cost of such a deed "not unfrequently exceeds the income of the Charity for a whole year." Even in the case of stocks, the transfer, involving as it does official proof of the deaths of the old Trustees, is a matter often both difficult and costly. Such appointments, moreover, are made privately; whilst those made by Order are only made after considerable local publicity has been given to the names of the proposed Trustees.

Much expense would be saved to the charities, and a far stronger guarantee obtained for the due selection of their administrators, if the Legislature would require all new

* Parl. Papers, 1857-8, xxii., p. 264. † *Supra*, p. 114.

‡ Charity Commissioners' Report of 1878. Parl. Papers, 1878. Cf. Parl. Papers, 1873, xxi.

appointments of trustees to be henceforth made by Order. There is no reason why millions of public property should be left, from generation to generation, in the hands of self-constituted bodies.

Such a course would be far preferable to any measure which merely provided for economy and not for supervision; like Mr. Hardcastle's unsuccessful Bill of 1861, by which a brief memorandum of the appointment of new charity trustees by the old ones (on the principle of that supplied by Peto's Act for trustees of Dissenting chapels), was to be registered, and the registration was to add to it the effect of a conveyance of the charity property.

The efficiency of the local bodies of administrators might be further secured by giving power to the Charity Commissioners to compel the appointment of new Trustees whenever vacancies had occurred;* as well as by provision for the summary removal of incompetent or inefficient Trustees. It has already become common, when a cy-pres scheme is made for an unincorporated Charity, to insert in it a clause providing that any Trustee who is convicted of crime, becomes bankrupt, leaves the country, or absents himself for two years from all meetings of the Trustees, shall lose his office, though remaining eligible for re-election. Mr. Fearon has pointed out the desirableness of rendering this, by Act of Parliament, a general rule for all Charities.†

* Such a power was given in Ireland in 1871; 34 & 35 Vic., c. 102, s. 15. For evidence of its importance, see below, p. 261.

† Schools Inquiry Commission. Evidence, Q. 13,367.

PART V.

THE REVISION OF CHARITABLE ENDOWMENTS.

Il est impossible qu'une Fondation perpétuelle ne devienne à la longue d'une éternelle inutilité.—*Condorcet.*

Was not Swift thinking of our perpetual Foundations when he sketched the Immortals of Luggnagg? In that kingdom there were eleven hundred of these Struldbrugs, and amongst them "a young girl born about three years ago." (The voyage to Laputa appeared in 1727,* and in 1724 Guy's death and will had drawn unprecedented attention to the subject of Foundations.) Gulliver's theoretical admiration of the Immortals was rebuked by his guide because it pre-supposed in them "a perpetuity of youth, health, and vigour, which no man could be so foolish as to hope, however extravagant he may be in his wishes." The Struldbrugs, it was found, "commonly acted like mortals, till about thirty years old, after which by degrees they grew melancholy and dejected. They have no remembrance of anything but what they learned and observed in their youth and middle age, and even that is very imperfect." Again we read: "The language of the country being always upon the flux, the Struldbrugs are not able after two hundred years to hold any conversation, further than by a few general words, with their neighbours the mortals; and thus they lie under the disadvantage of living like foreigners in their own country." If the parallel is apt, the moral is appropriate: "*As soon as they have completed the term of eighty years, they are looked on as dead in law.*"†

Innumerable as the circumstances of human life are the currents of change by which the utility of a Foundation may, in course of time, be diminished or destroyed. But it may be well to enumerate a few which actual experience has rendered most familiar, whether as removing the evil

* Scott's edition of Swift's Works, xi. 13. † *Voyage to Laputa*, chap. x.

which a Foundation existed to meet, or as removing the power of the Foundation to meet it.

A change of the proportions in which the nation's wealth is distributed amongst the various classes of the community, may remove all need for a Foundation which originally was of the utmost value. If any pious lord of the thirteenth century made a perpetual provision for the wants of the villeins of his manor, it was not with any intention of adding to the luxuries of the comfortable copyholders of modern times.

A change in the occupations commonly followed in a nation, a class, or a district, may utterly upset the most confident calculations of even a prudent Founder. Mr. Anthony Trollope, with the skill of a Dutch painter, has delineated all the details of such a case in the pages of "The Warden." *Ridens dicit verum.* John Hiram's charity for superannuated woolcarders continued to support Warden and Bedesmen long after all species of cards had been forgotten in Barchester, except that which supplied the implements of Archdeacon Grantley's rubber, and when not one of the bedesmen had ever carded wool enough to make Mr. Trollope a pen-wiper. Under the will of Roger Brettridge, in 1683, certain lands in the county of Cork were devised for the purpose of making payments to "seven poor old men of the Protestant religion in the asylum, that had been soldiers, and were unable to work," and the surplus was to be applied in apprenticing the children of "poor Protestant soldiers" in the city of Cork. Sufficient Protestant soldiers cannot be found in Cork to exhaust the income of the Charity, which is £350 per annum, and there is at present an accumulated fund of £2300.* In Stirling there are funds worth £5400 a year, which were given, when certain trades and crafts possessed a monopoly in the town, for the indigent members of these guilds. At the present day these funds are spent upon persons of whom "a very large portion have no connection whatever with the trade of their respective corporations or even with the town of Stirling.† Similarly, at Chester a large endow-

* Irish Commissioners' Report of 1879, p.4. † Parl. Papers, 1867-8, xxix. 73.

ment was created by a Mr. Owen Jones for the poor of the twenty-three trading companies of that city. In the course of the eighteenth century, the income of that Charity became so great that it began to be distributed amongst the bulk of the members of the companies, irrespectively of poverty and even of residence. In 1869 it was found that of the 412 members, 369 were recipients of the Charity, and some of these were soldiers in Australia. Yet all these companies except one, had long ceased to be connected with the trades whose names they bore, and were kept up solely for the sake of enjoying the endowment. "They exhibit," report the Charity Commissioners, "the anomaly of a body of recipients being continued for the sake of the Charity, instead of the Charity for the sake of the recipients."* Of what avail now is William Bower's gift for teaching the children of Bridlington to card, spin, and knit? Sixty years ago Brougham's Commissioners found that no children had been taught for a long time past, or had wished to be.† Of what avail now are the annual prizes which Dr. Richardson founded in 1782 for the best pieces of woollen or linen cloth woven within three miles of Ripon?‡ Of what avail now is a foundation like that at Lurgan,§ for the supply of spinning-wheels?

A change in the opinions of the whole, or of any large section, of the community, may impair or destroy the value of endowments if they have been given to propagate those opinions; or even if they have been given to meet some collateral purpose, but so moulded as to assume that those opinions continue unimpaired. The least evil that can ensue is, that some obsolete doctrine, be it religious, scientific, literary, or political, is preserved in a lingering and factitious existence, marring the uniformity with which human conceptions might, if left to themselves, have advanced. In America there are still Christians who adopt Saturday as

* Parl. Papers, 1870, xxvii. 18. The average gift to each recipient was reported to be £7 10s.; and he receives a gift every sixth year.

† Ninth Report of Inquiry Commissioners, p. 726.

‡ Third Report, p. 491.

§ Parliamentary Papers, 1878, xxiv. 38.

their Sabbath; but in England the Seventh Day Baptists have long been extinct, except where some Foundation has been created for the benefit of persons who may profess such views, or at least attend to hear them expounded. The Mill Yard Charity, in Goodman's Fields, has a gross income of £636, "for ministers teachers and poor, of congregations of Sabbatarian Protestant Dissenters." The survival of an endowed doctrine may, indeed, be merely nominal; the trust funds may serve only to distribute books which none of the recipients read, or to provide lectures to which none of the audience listen. In the present reign Chancery has gravely enforced a bequest for spreading the writings of Joanna Southcote; and to this day bequests are spent in maintaining the worship of the Protestant refugees of former centuries amongst congregations of which not a single member shares either the blood or the faith of those exiles. "A Foundation attached to the French Walloon Church at Canterbury, may be referred to as almost grotesque in its inapplicability to the needs of the day. An Englishman receives £40 per annum for reading a service, according to the English Ritual, but in the French tongue, to a congregation which cannot understand him, but is paid for going to hear him. It is stated that one of the recipients is the tenant, at a nominal rent, of a house belonging to the Foundation, and that, although unable to speak French, he is bound by one of the clauses of his lease to attend the service every Sunday."* The service is performed in the crypt of the Cathedral; and the average congregation consists of eighteen.†

It was only by means of a breach of trust that Professor Sedgwick was able to render the Woodwardian chair at Cambridge a source of light instead of a source of darkness. Woodward, in 1727, had directed his Professor to lecture "on some one or other of the subjects treated of in my *Natural History of the Earth*, or in my defence of it against Dr. Camerarius, in my *Discourse on Vegetation*, or in my

* Charity Commissioners' Report for 1870, Parliamentary Papers, 1871, xvi. 21.
† Popular Education Commissioners' Report, vi. 518.

State of Physic." But Sedgwick, in 1852, admitted that "neither the lectures as now given, nor the arrangements of the museum, are in accordance with the letter of the Founder's will;" and urged that "to comply with the letter of Dr. Woodward's will was morally impossible. It would have been a mockery to lecture on an exploded theory of the earth, or to enlarge on the mistakes of Dr. Camerarius."*

It is not inconceivable that an endowment might have been created in the last century to teach the Ptolemaic astronomy, or spread the faith in the Cartesian vortices. Looking to the strong religious interest that was felt in the controversy, it was quite likely that one would be created to maintain the Hutchinsonian system against the Newtonian. There can be no doubt that in all these cases lecturers, like our contemporary 'Parallax,' would readily have been found.

There are no changes more inevitable than those by which, in all provinces of human thought,

'Other creeds
Will rise with other years;'

yet there are no changes whose direction it is harder to foretell, or, indeed, whose very possibility men seem to find it more difficult to realise. Thirty years of Parliamentary discussion about endowed schools have rendered trite the observation that before the middle of the seventeenth century no politician and no Founder had conceived the possibility of a legally sanctioned Nonconformity existing side by side with the Established Church of England. Equally little could the contemporaries of the decaying Dissent from which men like Butler and Secker were deserting, have anticipated the glowing outburst of Methodism, or the sectarian activity which in later days would far overflow the traditional channel of the "Three Denominations," and cover the country with the meeting-places of a hundred faiths. We shall subsequently have occasion to notice a vivid instance of similar want of foresight in some remarkable precautions that were taken by Dean Swift to

* See the Report of the Cambridge University Commission, 1852-3, pp. 115, 117, 119.

provide for the future ecclesiastical changes which might affect a religious endowment that he was creating.* He foresaw the possibility of the State superseding the Irish Church by the establishment of some other form of Christianity; he foresaw the possibility of the State suppressing all forms of Christianity; but he failed to foresee the possibility of the change that actually took place, by which the State dispensed altogether with an establishment of religion, and at the same time placed all religions upon an equal footing of toleration.

Changes, again, in the limits of human knowledge, even when they do not involve any modification of our conceptions, may produce great revolutions in the comparative importance of various branches of them. It is now admitted on all hands that the courses of instruction prescribed by the founders of mediæval or Elizabethan schools are utterly inadequate to the needs of a century which possesses a vernacular literature that rivals those of Greece and Rome, and a knowledge of nature's secrets of which neither Rome nor Greece could have ever dreamed. But the admission was made by few men in the days when Lord Eldon tied down all Grammar Schools to the limits of classical instruction. "Arithmetic is rarely mentioned in early Foundations."† What, on the other hand, would be the value to-day of an endowment for teaching children to read Manx or Cornish?—a mere premium upon obsolete knowledge.

It is needless to multiply examples. Political changes will destroy the value of foundations—like those which, by terminating the era of Crusades, made the Military Orders a perilous anachronism. Physical changes may do the same —as where the disappearance of forests softens a Canadian winter, or dries a flooded district, and removes the necessity for precautions against the ancient evils. The Loughborough Charity was founded principally for repairing causeways and bridges; and in time the canals and the drains so

* *Infra*, p. 233.

† Report of Schools Inquiry Commission, I. 119.

carried off the water as to remove the needs for causeways, for bridges, and for the Charity.* Hygienic changes may remove diseases that once seemed ineradicable—as the disappearance of leprosy has studded this country with useless leper-hospitals.† Who, four hundred years ago, would have looked forward to a time when we should smile at an English foundation for the victims of plague or sweating-sickness? Changes in social habits may remove the value of a species of food or clothing that was once a gift of the truest charity. The uniform that is at one time thought an honour may come to be regarded as a degradation. "We recommend," said the Popular Education Commissioners, "the discontinuance in charity schools of grotesque peculiarities of costumes. . . . By degrading the charity, they lower the value of the fund."‡ Who would now desire to carry out the directions of Sir Thomas Coningsby, who, when founding in 1617 his hospital for old soldiers, required each of his almsmen to have "a fustian suit of ginger colour, of a soldier-like fashion, seemly laced; a hat with a band of white; a soldier-like jerkin with half sleeves; and a square shirt down half the thigh, with a *moncado* or Spanish cap; a soldier-like sword with a belt, to wear as he goeth abroad; a cloak of red cloth, lined with red baize, and reaching to the knee, and a seemly gown of red cloth, reaching down to the ancle, lined likewise with red baize, to be worn in the hospital and city of Hereford; the cloak to be worn in further walks or journeys."

The extent of these social changes is rendered peculiarly prominent by the minute directions imposed in the constitutions of the older endowed schools. The Schools Inquiry Commissioners report that "the specific directions of the founders in many cases cannot be obeyed, unless their chief purpose is to be sacrificed to the mere details by which, in their day, that purpose was most fitly worked." And again,

* Report of Schools Inquiry Commission, Evidence, Q. 13,323.

† The Master of the Newcastle leper hospital continued until lately to receive £600 a year, though the hospital, even as a building, had long ceased to exist. (Report of Popular Education Commission, iv., 356.)

‡ Report I., 503.

"The Founders' language, as applied to the present position of Foundations, is frequently that of men disposing blindfold of property of which they do not know the value, distributing it to persons of whose needs they are ignorant, and directing the execution of purposes which are impracticable and undesirable."*

Thus, when Richard Pate, in 1578, founded the Cheltenham grammar school, he provided for the scholars' books by ordering the entrance fees of fourpence and threepence paid by residents and non-residents respectively, to be for the "schoolmaster to buy Latin and Greek books for the use of the scholars, to be tied fast with little chains of iron in some convenient place in the school, and when the school is sufficiently provided, the master to enjoy the surplus." When Alderman Dauntsey, in the reign of Philip and Mary, wished to establish an almshouse at West Lavington, he thought it sufficient to direct the Mercers' Company to build a house with eight chambers, one for the master, and seven for seven almspeople to live in. So at Middleton, in Lancashire, Dean Nowell, in Elizabeth's reign, recites in the trust deed, that he had made a convenient building for a grammar school, with suitable apartments for the master and usher; the school being a building like a barn, with a small room at each end, approached by steps from the outside, to serve as the suitable chambers for the master and usher respectively. The statutes of Winchester direct the *Fellows* (not merely the scholars) to sleep three in a room.† Sir T. Boteler's executors, in 1526, in giving statutes for his school at Warrington, declare that it shall be lawful for the schoolmaster, for the time being, to take of any scholar four pennies in the year, viz., in three quarters of the year "one potation penny, for the which he shall make a drinking for all the said scholars," and at Shrovetide, "one cock penny," referring in the latter words to a brutal sport prevalent then in the North of England, but which seems strange to us.‡ And the statutes of Hartle-

* Report I. 113.

† Report of Public Schools Commissioners. Parl. Papers, 1864, xx., 136.

‡ Cf. Fifth Report of Inquiry Commissioners, p. 73.

bury School, expressly authorise the master "to have, use, and take the profits of all such cock-fights and potations as are commonly used in schools." Sir John Deane, in his statutes for the school of Witton (Northwich), in 1557, "wills that upon Thursday and Saturday, in the afternoons, and a week before Christmas and Easter, according to the old custom, they bar and keep forth the school the schoolmaster, in such sort as other scholars do in great schools." Very frequent are injunctions that "the scholars in all their speeches within the school shall use the Latin tongue, and no other," and requirements that the master shall teach in the school from six (or in the winter from seven) in the morning to eleven, and from one to six (or in the winter five) in the afternoon.* (In the sixteenth century the limits of a child's capacity of attention had not yet been ascertained, and the triumphs of the half-time system were still undreamed of.) John Alleyn, in the 89th of his statutes for Dulwich directs that the scholars shall have daily at their eight o'clock breakfast, "a cup of beere," and at dinner and supper, "beere without stint."

The Public School Commissioners reported† that "The existing statutes of Eton College contain, as might be expected, a great number of provisions which have long fallen into desuetude, and there appear to be but few portions of them which, at the present day are, or indeed could be, really observed at all." Yet Lord Lyttelton says, "Every possible precaution is taken in those statutes to enforce their everlasting obligation; and, particularly, the plea of desuetude is expressly barred;" and Mr. Justice Coleridge adds, "The non-observance of the Eton statutes, coupled with the oaths that are taken, is, I may almost say, a shocking thing."‡

We may admire the *esprit de corps*, but question the wisdom, of the tobacconist who devised a field upon trust

* See Report of Schools Inquiry Commission I., 1134; and compare the accounts given in Carlisle's *Endowed Grammar Schools* of the foundations at Chigwell, Kirkby Stephen, Skipton, and Southampton.

† Parl. Papers, 1864, xx. 57.

‡ Parl. Papers, 1864, xxi. 198.

"to supply six poor women with snuff at Bartholemy-tide."* (The field ultimately became building land, and its rents "would have produced snuff enough to bury them in.")

The men who, like Coward, gave fortunes to found Dissenting colleges, could not foresee that in a few generations the national Universities would be open to all the nation. The men who bequeathed endowments to provide education for the poor could not foresee that a time would come in which the best and the most generally accessible of all schools for children would be those which would be provided for the working classes. In the last century no friend of the negro foresaw that slavery would become extinct throughout all English-speaking lands, and that a black servant would be a rarity in London. Archbishop Tenison founded his library in 1697, and his deed recites that he was moved to do so "by the consideration that in the precincts of the city and liberty of Westminster there was not then any one shop of a stationer fully furnished with books of various learning, or any noted library of easy access." All these civil conditions have passed away as completely as those which moved Bishop Storey when, in 1497, he founded Highleigh Prebendal School, "propter ignorantiam sacerdotum, et proborum raritatem ministrorum, Diocessûs Cicestrensis."

What mediæval moralist anticipated that to give alms to beggars would come to be regarded as a vice instead of a virtue; and that philanthropists would agree in saying, like Mr. Edwin Chadwick, "If you would stop mendicity, which is the great seed-plot of juvenile delinquency, and habitual adult crime, you must positively *punish* indiscriminate almsgiving?"

What mediæval founder was enough of an economist to trace the evils which he would entail upon his kinsfolk by making a permanent provision for his poor relatives? Such gifts have often been created. They seem, indeed, to be closely akin to those perpetual family settlements which our law so stringently prohibits; but Chancery has declared

* Transactions of Social Science Association, 1866, p. 335.

them to be legal, on the ground that they are only settlements "in favour of a particular description of poor." Their economical results have, however, been proved by experience to be so injurious, that the Charity Commissioners recommend that Parliament should declare all such gifts, present or future, to be illegal and void.* Such a settlement combines the disadvantages of a private entail with the disadvantages of a public Charity. "It does not confer the independence of private property; the benefits are obtained by a course of solicitation, importunity, testimonials, certificates, and all the apparatus of begging, out of which the applicant must emerge with his self-respect largely abated. Yet it has not the advantage which a well-managed public Charity may have, of being made an inducement to exertion and good behaviour; for the right of private property so narrows the area of distribution, and gives such a primâ facie claim, that the gifts are claimed in a somewhat threatening way, and it is not easy for the Trustees to make them at all dependent on, or conducive to, good behaviour."† As Lord Kingsdown said, "The nature of the trust makes it impossible for the Trustees to administer it in any manner that can be satisfactory either to themselves or to the objects of the charity." The most famous case is that of Henry Smith, who, in 1626, established such a Foundation. In 1700 it relieved four of his poor kindred; and in 1868, at a cost of £6797 a year, four hundred and twelve—one quarter of whom were his great-great-great-great-great great-great-great-great-great nephews and nieces. The inspector ‡ reports that, "some live upon the gifts, and—there seems reason to believe—neglect altogether, or follow carelessly, occupations by which they might earn a living."

The founders who limited so many of their pecuniary benefits, from fellowships down to almshouses, to the residents in particular localities, assuredly never foresaw how completely the ties of locality would be upset in our own day by facilities for locomotion, and by the financial arrangements which enable men of the *rentier* class to live where they

* Report of 1868-9, p. 5. † Ibid, p. 37. ‡ Ibid, p. 37.

please, without reference to the place or nation where their fortunes are invested. What munificent liveryman of the Elizabethan age foresaw a time when the City, whilst wealthier and more potent than ever, would have ceased to be a place of residence, and the citizens, if only for sheer economy's sake, would find it needful to live miles away from their Wards ?

The parochial Charities of the City of London stand, indeed, so notoriously in need of a thorough revision, that a Royal Commission was recently appointed to report upon them. Endowments whose annual value now amounts to £104,102, and is steadily increasing, are spent amongst a population which in 1861 only numbered 112,063, and in 1871 only 74,897, and is steadily diminishing.* The Educational Endowments Committee of the London School Board last year issued a remarkable Report upon these endowments, in which it is shown that £56,000 a year, or more than half the income, is at present so uselessly spent as to imperatively require reappropriation to new uses. The Committee suggest, as a desirable use, the establishment of Technical Schools, and of exhibitions for the boys and girls attending them. The Royal Commission issued its Report this year, and recommends the creation of an Executive Commission to institute a more searching inquiry into the trusts and finances of the City Charities; with power to transfer the surplus funds of ecclesiastical Charities to the Ecclesiastical Commission, and the surplus funds of eleemosynary Charities to a representative Board to be constituted for this purpose. Power is then to be given to each of these two bodies to make cy-pres schemes for the application of the surplus funds so transferred to it, to ecclesiastical or to eleemosynary purposes within the area of the metropolis at large. "Thus doles might be exchanged for aids to hospitals and provident societies; the bequests for apprenticeships applied in the promotion of industrial

* "One City parish," say the Charity Commissioners, "is in possession of parochial charities of the value of upwards of £800 a year, the population of which is at the present moment *forty-six* only; of which number it is believed that only four or five sleep within the parish, and not one could properly come under the designation 'poor.'" (Parl. Papers, 1877, xxvi. 171.)

education in the institutions created for this purpose; and those for schools which may be no longer required, in aid and improvement of either existing schools, or establishments of the same nature. Where charities exist to which no definite object has been assigned, they might be employed in the promoting the general benefit of the inhabitants of the metropolis, *e.g.*, for the preservation of open spaces, establishment of lodging-houses, &c." As regards the ecclesiastical City Charities, it appears that £6296 is yearly devoted to the endowment of sermons, and £36,046 to more general Church purposes; whilst the Commissioners report that the City churches "are now in many cases almost, if not altogether, without congregations." As regards the eleemosynary City Charities, the Commissioners report that "large sums bequeathed for charitable purposes are still applied by parochial authorities in payment of the poor rates to which the parishes are liable." As regards the administration of the City Charities, the Charity Commissioners have already reported * that "large sums are given under the head of 'General Parochial Purposes,' to increasing the salaries of, or the presentation of testimonials to, churchwardens or other parish officers, and to other objects, *sometimes of a convivial nature*, still more widely removed from the original objects of the Foundations. The Commissioners have in several instances, notwithstanding the opposition of the parish authorities, who claimed the right to expend the income arising from these Charities as they think fit, enforced the production of the accounts relating thereto." The Royal Commission similarly tell us that, "In one case the sum of 5s. was left some four hundred years ago to defray the cost of a 'love feast,' at which parties at variance should meet and be reconciled. This feast has, supplemented by the charitable funds of the parish, now expanded into an annual dinner at Richmond, costing about £60; whilst the modest bequest of £1 6s. 8d., dedicated to the 'maintenance of some godly, virtuous, and well-disposed scholar at the University of Oxford or Cambridge,' has

* Parl. Papers, 1877, xxvi., 17.

received no addition whatever. Such misapplication of charitable funds does not appear to the Commissioners to require comment; nor the still more extraordinary misuse of them in the case of the united parishes of St. Vedast and St. Michael-le-Querne, where the expense of the prosecution of the Rector is stated to have been defrayed from this source."

The annihilation of the Barbary corsairs has rendered useless the many endowments—like the famous one held by the Ironmongers' Company * — for the redemption of Christian captives abroad. And the abolition of imprisonment for debt has rendered useless the analogous endowments for debtors in gaol at home. So numerous were these latter Charities in Ireland, that when they were thus superseded a special power was given to the Board of Bequests by the General Prisons Act† to make cy-pres schemes for their application, even when their amount exceeded the ordinary limits of the Board's power. It is proposed‡ to apply them in supplementing the 40s. grants which the General Prisons Board has power to make to criminal prisoners on their discharge, but which, especially in the case of female prisoners, are often too small to be of substantial service. In England the "Society for the Relief and Discharge of Insolvent Debtors" could find so little employment for its funds, that by 1856 it had accumulated £106,965.§

It may be added that, in like manner, the modern reforms of criminal punishment have also had some effect in superseding ancient Foundations; as in the case of the Exeter Charities for maintaining prisoners in gaol and for providing shrouds for those executed on the gallows, ‖ or of the

* Thirty-second Report of Inquiry Commissioners, 2.451.

† 40 and 41 Vic. c. 49, s. 58.

‡ Report for 1879 of the Board of Bequests.

§ Report of Popular Education Commission iv., 362. It was accordingly reformed in 1856 by an Act of Parliament; which instead of assigning a new and specific object for this great property, empowered the governors to vote its income to *any charitable institutions* that a majority of four-fifths might agree on. There were sixteen governors, twelve of whom never acted. The Act thus enabled four irresponsible persons to vote away £4000 annually.

‖ Cf. Sixth Report of Inquiry Commissioners, p. 118.

endowment established at Reading in 1787 to buy firewood for the county prison, which is now a benefit to the rate-payers instead of the prisoners. Other legal reforms have superseded the Charities which were founded to remedy defects in our public administration; and we no longer need the endowments for setting forth soldiers or providing archery butts,* for defraying Tenths and Fifteenths,† for making or amending bridges, roads, and wells, for paying the expenses of the M.P. for the borough, for hanging out lanterns in the streets of London, or even the great Foundation for constructing and maintaining a conduit in Cheapside.‡

Similarly our spiritual progress has removed all need of the endowments for strewing church floors with hay and rushes or for paying persons to go about the church awakening sleepers and turning out dogs. Yet at Wingrave,§ Bucks, three roods of meadow were devised for the former purpose; and for the latter an acre at Peterchurch, Herefordshire, and as recently as 1725 a sovereign a year at Trysull, in Staffordshire. ‖ Our moral progress has removed all our gratitude for endowments to provide bulls to be baited,¶ and even for those which provide prizes to be raffled for, like the annual half-dozen of Bibles at St. Ives. At Reading an annual gift of twenty nobles was established in 1611 by John Blagrove, for which three selected maid servants were "to cast and try by lot" every Good Friday. It proved so congenial, at one time, to local tastes as to inspire no fewer than three other citizens of Reading to give endowments in

* Tenth Report of Inquiry Commissioners, p. 745.

† Eighth Report, pp. 328, 455, 551; Twelfth Rep., p. 201; Thirteenth Rep., p. 43.

‡ It was reported in 1861, by an Inspector of Charities, that the establishment of county asylums had superseded all Foundations for the support of chronic incurable lunatics; among others an endowment of lands in Lincolnshire with £5000 a year, held by Bethlehem Hospital for this purpose. (Report of Popular Education Commission, vi., 508.)

§ Report of the Inquiry Commissioners, xxvii., 108; see other cases, viii., 607; xxiv., 57; xxx., 618; xxxii., 4.422; xxxii., 5.158; cited in Edwards' *Old English Customs.*

‖ *Ibid.*, v., 634; see other cases, iv., 249,504; vii., 471,582; xxx., 297.

¶ Wokingham, Berks. (Thirty-second Report, I., 220.)

aid of it. But in our own day the Charity Commissioners found upon local inquiry that "the practice of casting lots for the gifts is considered especially pernicious."* Similarly our political progress has rendered it no longer necessary for the Trinity House to retain in the present century the rule which it laid down in 1685, that all its almsmen must be "of loyal principles towards His Majesty and his government."† On the other hand, our spiritual apathy, by deferring the hour of matins, has removed all need of such an endowment as was given in 1634 at Bedford, "to provide lights at St. Mary's, so long as morning prayers shall be there used between All Saints and the Purification."

An instance of a very comprehensive and yet very futile Foundation is afforded by that of Mr. Henry Smith, who in 1626 left large sums for four objects. Part was to go in redeeming captives from pirates; but since 1723 no captive has been found on whom it could be spent. Part, now producing £8235 a year, was to go in Doles; and is distributed with the usual results among 209 districts; in one of which it is given to one household out of every two, in another to two households out of every three, and in another—according to the vicar—"a charity was never worse applied, its effects are demoralizing." Part, again, was reserved for Mr. Smith's poor relations; and is still distributed among them, to the extent of £6797 a year, with the result of making it the interest of some hundreds of persons *not* to work and get on in life. The final part was to be devoted to buying impropriations for preachers, and its income is distributed among the poor clergy, though the resulting benefit is found to be more than counterbalanced by the disappointment caused to the unsuccessful applicants, the trouble of the canvassing, and the perilous habit which it too often inspires of begging with colorable tales of poverty.‡

A striking instance of the failure of a Foundation which had been carefully planned by a man of more than average wisdom and more than average goodness, is afforded by the

* Report of 1861, p. 22. † Parl. papers, 1834, xii., 356.

‡ Charity Commissioners' Report 1868-9, p. 34.

history of Abp. Abbot's endowments, to which reference has already been made.* Part of his gift was for almshouses, and he made the almspeople themselves into a corporation. So great was the consequent mismanagement, both of the estates and of the hospital, that the corporation has recently been dissolved, and the administration placed in other hands. The rest of his gift was to encourage manufactures in Guildford, so as to revive the ancient industrial life of the town. In 1656, only twenty-three years after Abbot's death, the Lords Commissioners, on a petition from the town of Guildford, put an end to this part of the scheme, and converted it into a dole. In the reign of George III., Chancery, by a third scheme, abolished half the dole; and by a fourth scheme, in the present reign, abolished the whole of it.†

Nor have we any right to suppose that the sociology of our own day has attained a degree of perfection which will enable it to guide Founders to unerring schemes of charity. It may be doubted if even our most confident charitable projects will stand the test of time. I will take the strongest instance that can be advanced.

The Endowed School Commissioners adopted a plan of applying the endowments of primary schools in sending to secondary schools those boys whom competitive examination showed worthy of the favour. The plan was endorsed by Mr. J. S. Mill as "the most enlightened that ever yet proceeded from any public authority in the United Kingdom."‡ But it seems open to serious objections, both physical and moral. The physique of boys is little adapted to the strain of competitive examination; and experience seems already to suggest that these prizes are sapping the health of lads who would otherwise have been the *élite* of the working classes, and that at best they will tend only to produce the hot-house minds of French schools, with a defective physical, and therefore an unhealthy moral, development. There is also an ethical objection to any change of social station

* *Supra.* p. 39.

† Report of Inquiry Commissioners xxxi., 887; Journal of Society of Arts xvii., 680; Report of Charity Commissioners 1861, p. 13.

‡ *Fortnightly Review* xi. 389.

effected at so early an age, before family ties have become loosened by maturity. Sir Astley Cooper reported to the House of Commons' Committee on Medical Education,* "It has happened to me repeatedly to have an opportunity of introducing into the profession the sons of persons who were in a lower sphere of life. They have become generally bad sons and very bad subjects; they despise their parents; they will not mix with their family; and the system destroys the best feelings of the heart." A painful instance was afforded in 1876 by the attempted suicide of a Christ's Hospital boy, who left a letter saying, "I have acted a farce now for over eight years, and cannot bear up any longer. . . My home was hardly a home to *me*. The reason perhaps is that I was brought up out of place, above my station."† So, again, the Lord Provost of Edinburgh told the Mortmain Committee of 1851 that it was "a very general result" of admitting a boy to Heriot's Hospital, that "when he is sent home to go to his apprenticeship, he becomes exceedingly unmanageable, . . . will not eat the food that the other children are too thankful to take, nor be content with the same clothing that they are too glad to wear, and is thus the means of bringing insubordination into families in nine cases out of ten."‡ Yet if a Royal Commission and Mr. J. S. Mill be thus mistaken in their most strenuous recommendation, what can we expect from the wisdom of an average Founder?

But even if the lapse of time disclose or produce no defect in the Founder's purposes, it may nevertheless produce the widest disproportion between those purposes and the pecuniary means he has supplied for effecting them. Where his endowment consists of land, this disproportion is, as we have already seen, extremely likely to arise, and to produce a superfluity of wealth which, unless some external interference takes place, must necessitate the grossest waste. A case is on record in which a Founder, after charging property with charitable annuities of specific amount, calculated that

* *Life II.* 431.

† Parl. Papers, 1877, xxvi. 44.

‡ Report. Evidence, p. 439.

the residue of the rents would only be about twenty shillings a year, and accordingly directed it to be given, every New Year's Day, to the poor. But in a century and a-half, the value of this property so increased that this Dole fund reached the annual value of £900.* The discovery of minerals under the Charity land may produce the same effect. It would, of course, be equally necessary to revise the constitution of a Charity whose endowment was excessive at its very origin; like one which the parish of Frampton-on-Severn refused to accept, a legacy of £1000 bequeathed to them merely to buy Communion plate.†

The same disproportion may be produced in the converse way, by the diminution of the claims upon the Charity. The town of St. Leonards covers fragmentary strips of land belonging to several parishes of which the bulk was submerged four hundred years ago by an irruption of the sea. When the Ecclesiastical Commissioners were asked to assign districts for new churches to meet the wants of the modern watering place, their reply was, "Notice must be given to the patrons. Notice must be given to the incumbents. Till then we can do nothing." But for four hundred years not one of these submerged parishes had had an incumbent or a patron.‡ The ecclesiastical law had not foreseen the possibility of such a case. Equally little might a Founder have foreseen it. It is quite possible that charitable endowments may have been created for the benefit of the inhabitants of many parishes that have thus been swallowed up; as, indeed, has been the case at Dunwich, where, for a population now reduced to 234, there are charities with a gross income of £166 6s.

Or the disproportion may be in the opposite direction; and a fall in the general value of money, or in the productiveness of a particular endowment, may leave a charity without adequate means for doing any effective work. Even at the present day, when financiers threaten to change our Consols into two and a half per cents., few Founders have

* Report of Schools Inquiry Commissioners. Evidence, Q. 12,932.

† Report of Popular Education Commission, III. 878.

‡ Hansard, June 21st, 1861.

the foresight of one who in 1810 directed the surplus income of his charity to be accumulated "as a provision for the event of a national reduction of interest."* Where the endowment of a Charity is originally too small, the State should not permit its institution; where it subsequently becomes too small the State should not permit its continuance. In either case a revision of the Founder's directions is imperative to prevent waste. The Endowed Schools Commissioners found a school paralysed because its founder had directed that "so long as monarchy and Protestant episcopacy shall remain in the land," its two masters should be in holy orders, and should receive salaries of £50 and £30; sums, of course, now inadequate to obtain the services of clergymen. A similar difficulty may perhaps arise at Alcester, where a benefactor in 1627 directed three sermons to be preached annually, in commemoration of the accession of Queen Elizabeth, the Spanish Armada, and the Gunpowder Plot; but only provided a pound a year as remuneration for the three.†

These considerations will be sufficient to prove that no Founder can possibly predict that the way in which he has disposed of his property is that in which it will always produce the greatest amount of benefit. It may be replied that no system of law would restrict him to limits of disposal so narrow as this. But the same considerations will abundantly warrant the further conclusion, that no Founder can possibly predict that the way in which he has disposed of his property is one which will always produce even a balance of benefit. Now the law is assuredly justified in requiring every endowed charity to produce at least this. The statesman need not, indeed, require that every Foundation shall, from its outset, be dedicated to purposes which are of demonstrably permanent utility—for this would really be to prohibit Foundations altogether—but only that when its original purposes cease to be useful, he shall be at liberty to revise and readjust them. Nay, even when a Foundation still remains on the whole beneficial, if the current of cir-

* Thirteenth Report of Inquiry Commissioners, p. 190.

† Fifteenth Report of Inquiry Commissioners, p. 515.

cumstances has so altered its character that it does not produce the particular kind of benefit that the Founder intended, surely in this case also, the statesman may equally claim a right of revision. Thus in Ireland an endowment worth £41 18s. 4d. a-year was left in 1815 "to assist the Board of Bequests in recovering embezzled charities."* At the present day the protection of charity property is made a matter of State concern in Ireland, and all costs which the Board fails to extract from defendants are repaid to it by Parliament. Consequently this annual income is useless to the Board, and is therefore handed over every year to the Exchequer. Similar examples might of course be found in the sphere of primary education, and all the other interests which after being left to private charity have at last been adopted by the State. "There are more than two thousand endowments which were given for primary education, and are now rendered unnecessary by the schools aided by Government."† Lord Redesdale, indeed, has seriously urged in Parliament that if a parish happens to possess an endowed primary school, it ought even since the Act of 1870 "to have the full benefit of the charity at least to the extent required to exempt it from rating for primary education."‡ But there are not many statesmen who will concur in the view that property which was settled in order to benefit the poor inhabitants of a parish must needs be applied in perpetuity to benefit the rich ones. It is calculated that only one-fifth of the rates, and consequently of the benefit of an exemption from rates, falls upon the working classes.

It is true that a strong feeling once prevailed, and even now is not extinct, that if the State revise Foundations it violates the inherent rights of Property. A man, it is urged, can do as he likes with his own. He was under no obligation to give his property in charity; if he chose to do so, the charity must take the gift upon the giver's conditions, and the Founder's intentions must for ever be held sacred.

* Parl. Papers, 1877, xxvi. 29.

† Report of Schools Inquiry Commission, I. 212. ‡ Hansard ccxviii. 157

Stated, as it usually is, as a question of abstract right, supreme over all expediency, this position cannot for a moment be maintained. Its assumptions are disproved by the testimony of every chapter in the history of law. In no country have the rights of Proprietorship ever been permitted to be absolute. In no country has an Owner of property been permitted to apply it to every purpose, or to dispose of it in every way, that his uncontrolled pleasure might suggest. Alike on the employment of property and on the alienation of property, restrictions have always been imposed, as well for the protection of other persons whom the proprietor's acts may directly affect, as for the protection of the general interests of the State. *Sic utere tuo ut alienum non lædas, Salus populi suprema lex*, are maxims sufficiently trite.

The question is rendered still more clear when we remember that we are here concerned, not with the mere transient temporary employment of a man's income during his life, but with restrictive dispositions of his fortune which are to retain perpetual efficacy after his death. Hence without entering into any disquisition on the origin or the sacredness of Private Property, it is sufficient for our purpose to remark that the power of Posthumous Disposition of private property is merely the creature of municipal law. Very little knowledge of Jurisprudence suffices to tell us that in the legal systems of civilised nations the most diverse rules have obtained with regard to that power. It has been granted; it has been fettered; it has been denied; no "natural law," nay, even no common dictum of juridical experience, can be claimed as defining it. All systems are agreed in recognising property, and assuring to every man the enjoyment of the fruits of his labour; to do so is essential to the establishment of industry, and to the stability of political institutions. But the power of posthumous disposition is far less highly valued by men than the power of enjoyment, and is therefore a far weaker stimulus to acquisition or frugality. The protection of the enjoyment of property is entirely independent of all questions as to

the disposition of that property at the time when the acquirer shall cease to be able to enjoy it; and is compatible with the utmost diversity of arrangements as to that disposition. The property may go to the State; it may go to the kinsfolk of the deceased, and under any one of multiform conceptions of kinship; it may go to the donor from whom it came; it may go to some successor whom the deceased has indicated, and under any one of multiform rules as to the formalities of such an indication, and the extent to which it is to be allowed to interfere with the claims of the donor, the kindred, or the State. If it is perfectly compatible with the rights of Property that the law should have this absolute control over the modes of its transmission at death, there can be no incompatibility in imposing restrictions in the particular case where it is transmitted for purposes that are called charitable. Some persons delight in protesting that a fatal blow would be struck at the most fundamental social principles, if a testator were not allowed to devote his property in unalterable perpetuity to any public purpose that his caprice or ignorance may suggest. They have surely forgotten that the law, without any protest from the most tender conscience, utterly disregards the intentions and wishes of the owner of property, even when dictated by the most sacred obligations of affection, gratitude, or humanity, if he devises it by a will which has only one witness, or by a will uttered only orally though before a thousand witnesses, or if he devises it to a person who attests his will. "Could a testator," as Mr. Edwin Field says, "carry his money with him, there might then be reason for allowing him to peremptorily dictate the conditions on which he leaves it behind."

The case is, indeed, really stronger than this. Not merely are gifts to perpetual charities as much open to qualification and restriction by the law as are all other dispositions of property, but, on every principle of legislation, they are much more so. The very notion of a perpetual settlement is at variance as well with the simplest political expediency as with all existing codes of law. Throughout Europe it

has been prohibited in private conveyances in spite of the most resolute efforts of family pride to establish indefeasible entails. Even in so highly feudalised a country as England, judges and statesmen have been agreed for centuries in contending against the abhorred principle of perpetuity; and if perpetual charitable Foundations have succeeded in obtaining legal sanction, it has only been as an anomalous exception in complete opposition to the general principles of our law. With as little justice can charities complain of any qualifications that may be attached to the extraordinary privilege thus conferred on them, as the Duke of Marlborough could have complained of any remote possibilities of alienation that might have been reserved in the Parliamentary entail of Blenheim. Such qualifications are perfectly consistent with the general recognition of the power of Testation. For a man may be perfectly competent to select the person most suitable to succeed to his property at his death, and yet utterly incompetent to detect the complex results which a public charity will produce, still less to foresee them to the end of time. Many systems of law would not concede to him even the simple right to make a will; any system that does concede it to him may still consistently refuse him the far greater power of creating a perpetuity.

It is a singular instance of the inconsistency of the human mind, that those who are most eager to plead the sacredness of a Founder's directions against any attempt to modify them by public authority, are often the first to excuse or to defend any inroad upon these directions that has been effected by private abuses. They saw with complacency "Christ's Hospital and Dulwich College, two very wealthy institutions, utterly changed from their specific original purpose,"* and the London grammar schools, thirty-three in number, "*all* metamorphosed, even in important

* Report of School Inquiry Commission I., 221. The endowments of Christ's Hospital were given for the most destitute classes, and "nearly as much for girls as for boys;" but Mr. Hare found in 1865 that it was educating 1100 boys and only 25 girls; and that with few exceptions these boys belonged to the middle classes of society. (Parl. Papers, 1865, No. 382. Q. 13,926-, 13,934.)

matters from the original form given them by the Founders."* They never resisted "the tendency of endowed schools generally to rise in the class, taking advantage of them,"† like Harrow, founded by John Lyon, the bricklayer, for the free education of the ranks in which he had been born. Yet what—as Sir James Lawrence in emphatic words, has asked—"What would be the feelings of John Lyon if he were now to visit Harrow, and find that the poor whom he intended to benefit are rigidly excluded? And Harrow is no solitary case. Throughout the country many a man who had left his little town and acquired elsewhere a competence, founded a free school in order that the poor lads of his native place should not have to encounter the difficulties he had himself experienced. These schools in too many instances have been diverted to the exclusive use of the middle and upper classes."‡ Those who have not resisted these unauthorised changes cannot consistently resist a revision by public authority.

But if the revision of endowments cannot fairly be resisted on any plea of injustice to the Founders, still less can such a plea be logically maintained by either of two classes by whom a desperate effort is sometimes made to urge it.

Sometimes the revision is said to be a violation of the rights of property of the beneficiaries; and this no doubt would be the case in any revision that did not respect the vested interests of existing individuals. But that principle of protecting all such interests has obtained so absolute a hold upon the minds of even the most destructive reformers, that no revision is likely to be suggested in practice that would be open to any objection upon this head. And beyond the vested interests of existing individuals we need not look; possible future beneficiaries, or the heirs of the present beneficiaries, have no claim upon the charity property, no right to insist that, if the Founder's appropriation

* Ibid. I., 221.

† Report of Popular Education Commission, I., 497.

‡ Hansard, ccxv., 1910.

of his wealth be a wasteful one, it shall nevertheless be perpetually observed. "In estates held by mortmain," as Hallam says,* "there is no intercommunity, no natural privity of interest, between the present possessor and those who may succeed him."

Still less is there any ground for a claim of right on the part of the mere Trustees or Governors of the charity; who, nevertheless, are often apt to base upon the proposition—which in one technical legal sense may be true enough—that the charity estate 'belongs to us,' the inference that they have therefore all the rights and claims of ordinary private owners. It is to be regretted that this imaginary right of the mere administrators of other men's Foundation has too often been recognised, even by the Legislature, as entitling them to a veto upon the revision of those Foundations; a concession which has marred the working of some valuable Acts of Parliament.†

Even Burke says, "In a question of reformation I always consider corporate bodies, whether sole or consisting of many, to be much more susceptible of a public direction by the power of the State, in the use of their property, and in the regulation of modes and habits of life in their members, than private citizens ever can be, or perhaps ought to be‡."

The question, however, has been raised whether the State, though fully justified in laying down these restrictions prospectively, can honestly act upon them retrospectively, and claim to revise a foundation that was created before they were laid down.

This view has been emphatically stated by Daniel Webster:—"Individuals have a right to use their own property for purposes of benevolence either towards the public or towards other individuals. They have a right to exercise this benevolence in such lawful manner as they may choose; and when the Government has induced and excited it, by contracting to give perpetuity to the stipulated manner of exercising it, it is not law but violence to

* Constitutional History, vol. i.

† *Supra*, p. 151 and 199 *n.*

‡ *Reflections*, p. 216.

rescind this contract and seize on the property. Whether the State will grant those franchises, and under what conditions, it decides for itself. But when once granted the Constitution holds them sacred till forfeited for just cause."*

In some countries and some periods it would indeed be a plausible plea against the revision of the existing endowments, that "the State must not break faith with the founders." But in our own country there is no ground for such a protest. The Reformation asserted once and for ever the supreme dominion of the nation over property given to even the most sacred public uses. What the State then gave, it can take away; what it then altered, it can again alter. As to subsequent gifts, every man who has created a Foundation since that time has done so with his eyes open. The gifts of the most venerable Founders were diverted from the uses they had impressed upon them, to other uses which to them would have seemed damnable.† If it is said that the State did not dare to go to the length of diverting them to secular uses, it may well be replied that it diverted them to uses far more alien to the Founders' wishes than any secular purpose would have been. Familiar experience teaches us that the men who to-day show similar beneficence in establishing churches and church-schools, will give liberally to all secular charitable uses, but would indignantly refuse to subscribe towards a dissenting meeting-house. We may be confident that in the same way their mediæval forerunners would far more gladly have seen their wealth applied in relieving common human wants than in maintaining heresy.

Some objectors, however, may waive the argument drawn from abstract right, but oppose the State's right of revision, by arguments drawn from expediency. Even the extreme argument may be urged, that thus to diminish the powers of a proprietor will diminish the inducements to acquire property. In the Parliament of 1736 Jekyll's Bill was

* Speech in the case of Dartmouth College.

† "When," says O'Connell, "you talk of 'disappointing the will of the original donor,' remember how many souls are suffering in purgatory at this moment for want of the masses which they gave their property to obtain."

gravely assailed with the remark that the power of giving away one's estate in charity was "a great incitement to industry and frugality, and consequently a great encouragement to trade." The love of money is, however, scarcely so weak in the human breast, or philanthropy so strong, as to make such an argument require any answer but a sad smile.

Very serious consideration is, however, merited by an argument which is often advanced, that few men will be content to give property to Charities if they cannot anticipate with any confidence that it will be permanently devoted to the purposes for which they have given it. Security is the mother of abundance.

There is undoubted force in this argument when it is addressed against those extreme theories of revision which propose to treat the property of every Foundation as a mere *res communis*, or, in the phrase of one eminent reformer, "a no-man's land," applying it forthwith to whatever purposes the public opinion of the moment may dictate, without affording any interval for trying the plan sketched by the Founder, or regarding even the outlines of his purpose as any guide in the application of the property. Thus Mr. Lowe regards Foundations "as in the nature of donations to which the Government may be considered a party. I think the Government has just as much right to interfere with endowments as it has with schools that it relieves directly out of the public funds."* In such a case a charitable bequest becomes no more than a mere gift to the public exchequer; and though, as we shall see, such gifts are not unexampled, there is little likelihood that the example will be often followed. Mere general patriotism, with no immediate object in view, is a far less potent sentiment than charity.

Bequests to the public treasury are by no means unprecedented. Sir Joseph Jekyll, the author of the 'Mortmain Act,' left £20,000 to the Sinking Fund. 'He might as well,' said Lord Mansfield, 'have tried to stop the middle arch of Blackfriars Bridge with his fullbottomed wig.' So, too, the once famous Abraham Newland, by a will made in 1799

* Report of School Inquiry Commission, Evidence, Q. 6570.

made a bequest of stock "to his Majesty's Government in exoneration of the national debt." (The Lord Chancellor directed it to be transferred to such person as the King, under his sign manual should appoint.)* And in the present reign, Colonel Petrie bequeathed his residuary estate, worth about £20,000, "to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of my beloved country Great Britain;"† and in 1850, Mr. Ashton,‡ a Manchester manufacturer, bequeathed his residuary estate, amounting to nearly a quarter of a million, to the Commissioners for the Reduction of the National Debt. So, too, there was in the famous Thelluson Will an ultimate limitation, which never took effect, for the same purpose, "to his Majesty, his heirs and successors, Kings or Queens of England, to the use of the Sinking Fund, in such manner as shall be directed by Act of Parliament."§ But the rarity of such cases shows how few testators will give property for the sake of a merely vague and general public benefit.

Push the power of Revision then to the full licence literally implied in the aphorisms of Sir Arthur Hobhouse and of Dr. John Watts, that "Property is not the property of the dead but of the living," and that "The world belongs to the living and not to the dead," and fatal results may ensue. Utterly and immediately reverse the settlements made by a dead man, and it is true that whilst you may thereby confer some additional benefit upon the living, you assuredly will inflict no evil upon the dead. But it must be remembered that by this same reversal you may so alarm some person who is still alive, as to deter him from making settlements of his own, which after his death would have been of advantage to successive generations of the living.

Yet whilst admitting to this extent the soundness of the argument from discouragement, we are justified in regarding it as of no weight when directed against the more moderate

* *Newland v. Att. Gen.* (3 Mer., 684).

† *Nightingale v. Goulbourn* (2 Ph., 594; 5 Hare, 484).

‡ Report of Mortmain Committee of 1844, Evidence, Q. 79.

§ *Thelluson* v. *Woodford* (4 Ves. 235).

theories of Revision, like that of Mr. J. S. Mill. If every Founder were guaranteed a period in which his experiment shall be fully tried, a Term of Inviolability during which his Foundation shall be left to work according to the principles and the details which he has planned, he would rarely, if a wise man, insist on more. The further guarantee might be added that when the time of revision came, the general object that he had in view, the particular province of charity that he selected, shall still be adhered to in any new scheme. It may safely be concluded that no Founder whose Foundation was worth having, would be discouraged by this prospect from creating it. Some gifts which were the mere offspring of malice, caprice, or vanity, might indeed be withheld in fear of such a Revision. But to lose such gifts would be a great gain.

Under this moderate principle of a Revision, the argument from Discouragement would actually change hands. Experience of the evil results of strictly adhering to a Founder's obsolete intentions has discouraged many men of benevolence from creating new Foundations. Some such feeling was probably in the mind of Baron Rothschild when, in the will that was proved last June, he directed his wife "to give £10,000 among Jewish charities, and £5000 among Christian charities, *the money not to be invested but to be spent for some immediate benefit or improvement.*" Nothing can more effectually deter a man from creating an endowment than the prospect of its ultimately proving to be useless or hurtful. On the other hand he will be encouraged to give, by knowing that the State has provided measures for rendering his Foundation constantly useful, in spite of any changes that time may make in its surroundings. The principle of endowment is really protected, and the creation of endowments stimulated, by saving them from mistake, misuse, and disuse, and therefore from discredit.

History, indeed, confirms this view. It is a significant fact that Mr. Whitworth, when creating in our own day an educational endowment as munificent as any of Edward VI.'s age, took express precautions to secure its revision. It is a

still more significant fact that whilst, during the last forty years, so many public Commissions have pressed, and so many legislative enactments have adopted, with steadily increasing boldness, the policy of deviating from the directions of Founders, this period of our history has witnessed no diminution of public munificence, but on the contrary, a remarkable revival. Thirty-five years ago, when the policy of interfering with obsolete or misapplied endowments was still a novel and suspected one, Mr. Charles Buller, speaking in the House of Commons, deplored the decay of beneficence. "I can see no sign that the landed proprietors are inclined to give property to pious purposes. I contrast the little that is given now with the much that was given formerly. When I look at the colleges and at the hospitals of the country, I am ashamed to observe that not one-fiftieth of their means has been contributed by men of the present age." And Lord Stanhope, discussing in 1839 the policy of George II.'s Mortmain Act, said, "In the last hundred years we have seen but little cause to dread the excess of posthumous charity."*

Yet only a generation has since elapsed, and the munificence of the Elizabethan age has already revived. The gifts of Mr. Peabody, in his life and at his death, amounted to £500,000. Gifts of a quarter of a million have followed one another with rapidity:—to the Kirk of Scotland, that of Mr. Baird; to the Episcopal Church of Australia, that of Dr. Tyrrell, 'the one colonial bishop who never came back;' to the cause of female education, that of Mr. Holloway. In 1879 Mr. Gardner bequeathed £300,000 for the blind, and Mr. John Ross £200,000 for the charities of Glasgow. (It is, perhaps not irrelevant to cite from a kindred nation another gift, equally recent, of still greater amount—Mr. Asa Otis's bequest to the American Board of Foreign Missions, which exceeded £500,000). Such are the fruits of the last few years, in which the policy of revision, of setting the spirit of Foundations above their letter, has become an axiom amongst all educated politicians. In no province of

* History of England II. 282.

charity has that policy as yet been so boldly carried out as in that of Education. It is significant that no other province has called forth the zeal of so many recent Founders. The gift of Sir Joseph Whitworth, the Science College of Sir Josiah Mason at Birmingham, the College of Mr. Mark Firth at Sheffield, the College at Nottingham, are familiar instances. Or to take a similar proof from religious charities. In 1703 the Society for the Propagation of the Gospel said, in issuing its first report,* "It is not to be expected that many should rise up to the example of an unknown lady who has cast in lately £1000 into the treasury of the Society." But in the one year 1879 Mr. W. C. Jones gave the Church Missionary Society £35,000; and Dr. Hugh Miller left £20,000 to the Free Kirk Mission. The argument from Discouragement should be pointed against those who wield it.

We may conclude, then, that the recognised principles of legislation will afford us ample warrant for any restrictions upon charitable gifts that experience may show to be desirable. If need be, we shall be justified in prohibiting them; or in accepting them, but forbidding the Founder to fix the nature of the charity, so that the State may apply the property to fresh uses, either at once, or when the lapse of time demands.

On this subject Lord Hatherley has expressed himself emphatically:†—"I entertain very strong opinions about posthumous charities especially, and, in truth, about the dispositions people are allowed generally to make of their property by way of charity. I think there ought to be a power of revision after a time specified, a power of revision of any disposition a person may choose to make of his property; because you do not allow a man to dispose of his property in favour of his great grandchildren, he cannot do it for more than a life in being, and 21 years after that. That reasonable limit he ought to be allowed, of course, for any fancy or whim he may have; but to allow a man to

* Anderson's Colonial Church II., 769.

† Evidence before Schools Inquiry Commission, 8vo. edition, V. 391.

dispose for ever of a mass of property according to his crude notions of what he thinks best by way of charity for all time, seems to be most unreasonable. . . . There ought to be the power of absolute gift for the limited time; but after a limited time, the life in being and twenty-one years afterwards, there should be a power of revising every charity whatever. It should be a public charity" [*i.e.*, so as to allow diversion not only to cy-pres uses, but to others totally different from those which the founder intended.]

The Popular Education Commissioners said in 1861,* "A power of modifying the regulations of founders for the advancement of their main design is necessary in order to prevent endowments from becoming, by lapse of time and change of circumstances, obsolete and useless, or even noxious to the interests which it was the object of the donors to promote. The power of posthumous legislation exercised by a founder in framing statutes to be observed after his death, is one which must in reason be limited to the period over which human foresight may be expected to extend. Without such a limitation, foundations would be open to the condemnation passed upon them by Turgot and other economists, as creations of a vanity which imagines that it can foresee the requirements of all future ages, and of a credulity which supposes that strangers, administering a founder's charity in distant times, will carry out his favourite system with a zeal equal to his own. By the law of England, and by the law of nature, a man is incapable of making a perpetual disposition of his property. The State suffers him to exercise an indefinite power over the land for the purpose of his foundation; and in so doing it is not only entitled, but bound to secure the interests of future generations, which can be done only by retaining the power of modifying the founder's regulations, when necessary, to suit the requirements of succeeding times. It seems, indeed, desirable in the interest of charities in general, and of educational charities in particular, that it should be clearly laid down as a principle that the power to create permanent

* Report I., 476.

ns is granted, and can be granted, only on the
implied, if not declared, that they be subject to such
tion as every succeeding generation of men shall
uisite. This principle has been acted on ever since
ormation, but it has never been distinctly expressed.
ers have been misled, and the consciences of timid
s and administrators have been disturbed by the
sition that, at least for charitable purposes, proprietor-
s eternal; that the land on which its rights have once
exercised can never be relieved from any of the rules
restrictions which have been imposed on it; that hence-
it is subject, and ever will be subject, to the will, not
e living, but of the dead."

Nor is it merely in theory that these views have obtained footing. Four hundred years of English history have given them practical endorsement. They are implied in the successive dissolutions of monasteries by so many kings down to the crowning blow under Henry VIII.; in Henry V.'s appropriation of 110 alien priories, and in all the dissolutions which provided the endowments of Winchester and Eton, All Souls' and Brasenose, Christ's and Jesus and Trinity. They are implied in the successive demolitions, during the past hundred and fifty years, of so many of the City Churches; by which, with the full approval of the successive Bishops of London, land has repeatedly been diverted from the most sacred of trusts.

The history of the last fifty years is full of instances of the application, the effectual and beneficial application, of the same principle. In each case the work has, indeed, been accomplished only after a sharp Parliamentary struggle; but it has been a struggle rather about the extent than the principle of the changes, and that principle may be regarded as admitted in fact, if not in words, by the leading minds of every section of politicians. Even Sir Robert Peel in 1834, and even Mr. Disraeli in 1867, whilst strenuously resisting an appropriation of the revenues of the Irish Church, showed every readiness to assent to a redistribution of them. Yet such a step would have been

utterly unwarrantable, if corporation property were really to be regarded as standing on the same footing with private property. Indeed all that Lord Sandon himself claims for the Conservative party now is, that they "respect the wishes of Founders *as much as they can, consistently with the requirements of modern society and modern feeling.*"*

No more emphatic illustration of the principle of revision can be needed than that which is afforded by the successive steps which have been taken in the last quarter of a century, to adjust our educational Foundations to the new conditions of English religious life. Schools and colleges, which were founded in view of an ecclesiastical unity that was expected to be perpetual, have been resettled to meet the needs of a nation divided into multifarious sects. The Oxford University Act of 1854 removed the tests required on taking certain degrees, whilst the Cambridge Act of 1856 went further, and opened all emoluments obtainable by undergraduates. In 1860 Lord Cranworth's Act directed the Trustees of Endowed Schools to provide a conscience clause in all cases where there was no express direction from the founder for religious instruction. In 1868 came the Public Schools Act, empowering a conscience clause to be put into the statutes for those great schools which had been exempted from the Act of 1860. In 1869 the Endowed Schools Act directed the Commissioners to impose a conscience clause on every endowment, without any exception even of Cathedral Schools. About a year later, when the statutes of the Public Schools were made and were laid before Parliament, the House of Commons addressed her Majesty on the subject; and the result was that as regarded Rugby, Harrow, Shrewsbury, and the Charterhouse, not only was provision made for a conscience clause, but the governing body ceased to be confined to members of the Church of England. Then, in 1871, came the University Tests Abolition Act, which abolished all restrictions on the governing bodies and on the holders of emoluments, excepting where

* Hansard, ccxx. 1643.

those holders were required to be in holy orders, or Professors of Divinity; and this Act made no difference whatever as regards the date at which the endowment was given, and thus includes even Keble College. The tendency of recent legislation seems to have been first to put in a conscience clause for the scholars, and subsequently to open the governing bodies.

Equally resolutely has the Legislature asserted and exercised its right of revision in the case of the secular details of the constitution of these educational Foundations. In 1854 the Oxford University Reform Act * empowered the Colleges to draft and submit to the Commissioners new statutes for various objects, "notwithstanding anything contained in the Statutes, charters, deeds of composition, or other instruments of foundation or endowment of any college;" and similarly empowered the University to draft alterations of the trusts or directions which any of its benefactors had attached to their gifts, if the gift were more than fifty years old, and it appeared to the University "that the interests of religion and learning, and the main design of the donor may be better advanced by an alteration of the Trusts or directions." In the Cambridge University Act of 1856† similar provisions were contained, even somewhat wider in their effect. Under these Acts many close fellowships were thrown open, to the great advantage of the nation and of the colleges. Again, by the Universities' Act 1877 ‡ of the late Conservative Government, powers have once more been created for revising the directions of Founders, and statutes may be made:—

"For dividing, suspending, suppressing, converting, or otherwise dealing with any Emolument held in or connected with a college."

"For modifying the trusts, conditions or directions, affecting any College endowment, foundation, or gift, or any property belonging to the college, or the head, or any member thereof as such, or held in trust for the college, or for the head, or any member thereof as such; as far as the Commissioners think the modification thereof necessary or expedient for giving effect to statutes made by them for the college."

"For assigning a portion of the revenues or property of the college,

* 17 and 18 Vic. c. 81, ss. 28, 30. † 19 and 20 Vic. c. 88, ss. 27, 30.

‡ 40 and 41 Vic. c. 48, s. 17.

as a contribution to the Common Fund, or otherwise for encouragement of Instruction in the University, in any art or science, or other branch of learning, or for the maintenance and benefit of persons of known ability and learning, studying or making researches in any art or science, or other branch of learning in the University."

It is added* that in every such revision the Commissioners,

"Shall have regard to the main design of the Founder, except where the same has ceased to be observed before the passing of this Act, or where the Trusts, conditions, or directions affecting the Emolument have been altered in substance by or under any other Act."

The principle of revision thus successful in the Universities has been applied as boldly and as successfully to the secondary educational endowments. Mr. Forster's Endowed Schools Act of 1869 empowered the Commissioners to recast the constitutions of existing school Foundations of more than fifty years' standing, and even of later ones if their governing bodies consented.† The power was needed. The creators of all educational endowments that are now two hundred years old—the founders of fully two-thirds of our grammar schools—must have been utterly unable to foresee how the circumstances of our day would affect the working of their plans. They could not foresee that the growth of the national literature and the rise of physical science would create important branches of education, which the statutes they were framing would unintentionally exclude from their schools. They could not foresee that the introduction of State aid would supersede all need of private endowment for other branches which their statutes did endow. They could not foresee that new facilities of locomotion would place their schools within reach of large outlying populations whom their statutes about locality would unintentionally exclude. They could not foresee that freedom of inquiry would surround their schools with large bodies of their countrymen whom their statutes about religion would unintentionally exclude. They could not foresee that their own zeal for knowledge would take such hold of their descendants that education would at last be claimed as a necessity, not only for the humblest ranks of

* S. 14. † 32 and 33 Vict. c. 56, ss. 9, 10.

men, but even for women, whom their statutes again would unintentionally exclude. Nor was their insight less fallible than their foresight. As the framers of Usury laws did not detect that they were thereby aggravating the difficulties of borrowers, as the patriots who sought to make the Plantagenet kings "live of their own" did not detect that they were thereby imperilling the power of the Commons, so the Founders of Schools did not detect that in dignifying the office of the master by rendering him irremovable, they destroyed the chief security for its due discharge.*

The main object of the Act, the readjustment of educational foundations, has been zealously carried out, as well by the original Commissioners as by the Charity Commissioners, to whom their functions were transferred by an Act of Lord Beaconsfield's Government. New schemes have already been completed, by which an annual income of more than a quarter of a million is regulated; and schemes are now passing through the hands of the Commissioners for the administration of other schools, with £177,000 a year; whilst the total income of the school endowments that still remain to be dealt with under the powers of the Act is only £166,000. Of the effect of the new schemes, the local managers of the schools are the best witnesses. They have given their testimony.

In 1877 the Charity Commissioners tested the operation of the Act of 1869 by issuing circulars to the governing bodies of all the endowed schools. The result of the replies was to thoroughly confirm the wisdom of this great measure. The Commissioners report that, "After carefully examining the returns, we feel justified in stating generally:—

> "That many foundations which had fallen into an effete condition have been re-established as

* "Endowed schools have suffered most severely from the tendency of the English law to treat a schoolmaster's office as a freehold. Schoolmasters have thus in effect been made to acquire an interest subversive of the main object which the Founder had in view." (Report of Popular Education Commission, I., 471). "Instances," says Lord Taunton, the Chairman of the Schools' Inquiry Commission, "are not uncommon of a sinecure master driving away scholars from his school, because they added to his labours without increasing his income." (Hansard cxcvii. 616.)

schools of higher education in new and commodious buildings, and are attended by large numbers of scholars, paying substantial fees for their instruction.

"That the attendance at schools, which were already successfully conducted, has, on the whole, largely increased since the new schemes have come into operation.

"That an important step has been taken in the direction of providing secondary schools for girls, and that such schools when established in suitable localities are at once largely resorted to."*

The similar revision effected in 1869 in the Merchants' School in Edinburgh, raised them in three years from 232 children, taught by 23 teachers, who earned £1700, to 3600 children, taught by 213 teachers, who, though the fees were lowered, earned £20,000.

But in addition to this revision of the schools, Mr. Forster's Act took the far bolder step of empowering the Commissioners to appropriate, for the advancement of education, endowments that had been created for non-educational purposes; provided that the trustees of the endowment consented, and that the endowment itself was, by its constitution, wholly or partly applicable to the following questionable or obsolete purposes:—

"Doles in money or kind;
Marriage portions;
Redemption of prisoners and captives;
Relief of poor prisoners for debt;
Loans;
Apprenticeship fees;
Advancement in life; or
Any purposes which have failed altogether or have become insignificant in comparison with the magnitude of the Endowment, if originally given to Charitable uses in or before the year of our Lord one thousand and eight hundred."

This power of diverting obsolete endowments has been

* Parl. Papers, 1878, xxiv., 22.

largely and beneficially exercised. The Grocers' Company consented to the diversion of no less than £23,000 of their non-educational trust funds.* By 1878 the sums that had been thus diverted, by the consent of their respective administrators, amounted to £10,500 a year.†

The most recent legislative measure of this kind is the Endowed Institutions (Scotland) Act of 1878,‡ by which a temporary body of Commissioners was created for the purpose of facilitating the revision of the educational and charitable Foundations of Scotland. Every proposal for revision must be initiated by a majority of the governing body of the Foundation concerned. They present a petition describing the reforms they desire; it is reported upon by the Commissioners; and a Secretary of State may then lay before Parliament a provisional Order for the reform of the Foundation. This Order comes into operation after 40 days if neither House adopt a resolution against it. The Act does not except even the most recent Foundations from this power of reform, and imposes no restriction upon the extent of the reforms that may be made. The Commissioners have already drafted Orders for the reform of nine Foundations. To appreciate the importance of this Act, it must be remembered that the Assistant Education Commissioners reported in 1867 that "the hospital revenues and mortifications throughout Scotland are of enormous value. Some of them as at present administered are of little use; and the number of persons whom they benefit, as compared with their pecuniary value, is ridiculously small."§

Nor is it merely in the extraordinary action of the supreme Legislature that this principle of revision has been asserted. In the every day jurisprudence of the Court of

* Parl. Papers, 1873, viii., 37. Contrast the City parishes; *infra*, p. 235.

† Parl. Papers, 1878, xxiv., 21. We have, however, already seen (*supra* p. 138.) how far larger are the sums which, though falling within this section, have not yet been diverted. The necessity of obtaining the consent of the trustees has seriously impeded the working of the Act. The clause imposing it was a hostile amendment; the Bill, as originally introduced, having only required the Endowed School Commissioners to obtain the consent of the Charity Commission.

‡ 41 and 42 Vic. c. 48.

§ Parl. Papers, 1867-8, xxix. 73.

Chancery provision is made for its regular and normal exercise. The cy-pres rule enables that Court to make a new scheme for any charitable endowment whose Founder's intentions prove to be impracticable or unlawful; just as it would make one where he had specified no intentions beyond a mere general gift "to charity," or where the income he gave had grown to exceed what could be spent upon the intentions he had specified.

A wider power of revision than that possessed by Chancery was given at one time to another permanent body —the Irish Board of Bequests. Under its original constitution of 1800 * the Board had power to divert endowments to cy-pres purposes, not only when it was unlawful or impracticable, but also even when it was merely "inexpedient" to apply them according to the Founder's precise directions. A Catholic nation was hardly likely to view with complacency a board of Protestant ecclesiastics and officials deliberating upon the "inexpediency" of the pious directions of Catholic testators. Accordingly this power of revision became so unpopular that when Sir James Graham reconstituted the Board in 1844,† though he destroyed its exclusively Protestant character, he destroyed also all its powers of revision. Obsolete charities were thus remitted to the cy-pres jurisdiction of Chancery, whose expensiveness made it inaccessible to small Charities, so that "a large number of them lay for many years unadministered and unapplied," ‡ whilst the narrowness of its powers left many inexpedient Charities no possibility of being revised. Thus Hall's Charity-school at Limerick had to be closed, because the Founder, at a time when money was of greater value, had fixed £10 as the salary of the master and of the mistress, and no master or mistress could be found for such a salary, whilst Chancery had no power to vary the amount. In 1867 the Board was authorised to exercise over small Charities the cy-pres powers of Chancery.§

These various considerations, then, of principle, of

* 40 Geo. 3, c. 75. † 7 and 8 Vic. c. 97. See above, p. 129.
‡ Parl. Papers, 1867-8, xxi. 4.
§ 30 and 31 Vic. c. 54, s. 7; 34 and 35 Vic, c. 102, s. 6.

expediency, and of precedent, may well lead us to accept it as one of the settled truths of political science, that even the express injunctions of a Founder cannot fairly claim to be regarded as of perpetual and irrevocable efficacy. But if this be so, far less can such a claim be maintained on behalf of any mere tacit wishes which he is conjectured to have felt, but which he has not expressed. Yet it often happens that a scheme for the revision of charitable endowments, whilst admitted both to be in itself desirable and also to contravene none of the Founder's directions, is nevertheless resisted as unjustifiable, on account of some shadowy ground for a conjecture that he would not have approved of it.

Some incidental expression in the instrument of foundation is made to control the other parts of it, as in Mr. Mowbray's argument that the fact of a college being named after a saint is sufficient to show that the giving of religious instruction was one of the main designs of its foundation*—a principle which would hardly have been admitted by the builders of Saint James's Street, of Paternoster Row, or of Ave Maria Lane.

Many instances might be quoted, where the pupils, the teachers, or the managers of a school have been permanently subjected to religious tests which the Founder had not prescribed, in consequence of some purely collateral regulation that he had made. Such cases are the more noteworthy because more than two-thirds of our endowed grammar schools, 554 out of the 782, date from before the Toleration Act, when our present legalised diversity of sects was a thing undreamed of; so that any denominational restraint must limit the benefits of the Foundation in a way the Founder could not have anticipated. Hence if any strained interpretation is to be put upon his words, we should expect it to be rather for the relaxation than the imposition of party limits. Yet at Stockport the governors and masters of the grammar school have been required to be members of the Established Church because the foundation-deed (of 1487), whilst entirely silent on the matter of religion, says that

* Hansard, cxciv. 1051.

"the priests" are to teach grammar. The same restriction has been imposed at Manchester, because the Founder in 1525 directed that the children should go to church—a direction which, when only one form of public worship exists, is of much less definite import than in an age when there are many. Similarly at Dulwich (1619) the direction that both masters shall be divines has been considered to imply that all the governors must be Episcopalians.

Until the last century no permanent public official except an ecclesiastical one could have been found, outside the metropolis, competent to control the working of a provincial school; and the Bishop (to whom the law had confined the power of licensing teachers), was naturally regarded by many Founders of schools as the most suitable person to act as their chief governor, visitor, or legislator. (So too at the present day, for similar reasons of competency, parochial incumbents are often made *ex officio* governors of schools, even in new schemes of an avowedly undenominational character.) Edward VI.'s charter to Birmingham school (1552) says that the governors "with the advice of the Bishop of the diocese for the time being" from time to time may make statutes concerning the order, government, and direction of the schools. Unimportant as this hint must appear in the light of history, Lord Salisbury considers it so conclusive a proof of intention that "it is difficult to imagine how any school could have been attached to the Church of England in a more distinct and direct manner,"* and that it warrants the perpetual exclusion of Nonconformists from all office in such a school, either as governors or teachers. The Endowed Schools Act Amendment Bill of 1874, as originally introduced into Parliament, proposed to adopt Lord Salisbury's inference as a general limitation on the revising power of the Commissioners.†

Yet the same politicians who pressed this reasoning in the construction of old instruments, were eager, in the case of new undenominational schemes, to create *ex officio* clerical

* Hansard, ccxvi. 75. † Parl. Papers, 1874, ii. 83.

governors, and to urge that such governorships were in no way inconsistent with a school's unsectarian character. They justly laid stress on such cases as that of Bradford, where a Nonconformist, Mr. Alderman Brown, had endowed the Grammar School with £6000, although the Vicar was *ex officio* one of its governors; but they ignored the possibility that King Edward VI. might have reasoned about his gifts in precisely the same manner that Mr. Brown had done.

Still more remarkable than all these are the cases in which the Founder's unexpressed intentions, when nothing could be found within the four corners of his instrument of Foundation from which even to conjecture them, have been treated as a matter "to be ascertained by history and evidence"—to borrow the language in which Mr. Beresford Hope has made the claim.* In such cases, in defiance of all legal principle, the express language of the document is controlled by extraneous testimony, or even by doubtful inferences deduced from historical conjectures. Thus it has gravely been urged in Parliament, that if the founder of a school can be shown to have been a member of the Church of England, this mere fact, in spite of his own silence, suffices to create "an inevitable inference that he intended the management of his school to be in the hands of Churchmen only."†

In all these cases, however, the Founder's unexpressed intentions upon one subject are supposed to be deducible from his language or his conduct when dealing with another, by natural processes of argument. There are, however, still stranger cases, in which unexpressed intentions are attributed to him by applying to his expressed intentions some purely artificial rule of construction. Thus it has long been the doctrine of Chancery, that "if land or money be given for the purpose of building a church or a house, or otherwise for the maintaining and propagating 'the worship of God,' and if there be nothing more precise in the case, the Court would execute such a trust by making it a provision for maintaining and propagating the established religion of

* Hansard ccxxi. 598.

† Hansard clvii. 987.

the country."* As Lord Selborne has put it, "The presumption is that religion means religion according to the Established Church."† Thus in the case of educational endowments, if the Founder has prescribed no particular form of religious teaching, the Charity Commissioners or the Chancery Division, in settling a scheme for the school, are bound to direct (along with a "conscience clause") that the religious instruction shall be given according to the principles of the Establishment.‡

Yet, as the Schools Inquiry Commissioners reported, "there appears to be no reason for maintaining this rule of law."§

Considered in reference to the intentions of the Founder, it certainly must often frustrate them. In some instances he would have preferred the teachings of another sect. This must have been the case in many of the endowments given before the Reformation, or during the Commonwealth, and even (looking to the doubt which, as we have seen, long hung over the legality of Dissenting Charities) in some that have been created since the Toleration Act.‖ In other instances he would have preferred unsectarian teaching. Thus Thomas Willsby, in 1682, endowed a school at Spalding, where children were to be taught "to read and write, and learn the principles of the Christian religion contained in the Apostles' Creed, the Ten Commandments, and the Lord's Prayer, with some plain familiar catechism explaining the same." His language seems to justify a suspicion that he would not have desired his endowment to be applied as the Charity Commissioners found it, when, though half the scholars were Dissenters, the Church catechism was taught them, and all of them were sent to the parish church.¶

Especially likely is it that this rule of construction will contravene the wishes of the testator, where the endowment is one that he gave to some distinctly non-religious purpose, from which the State has diverted it to purposes of educa-

* Per Lord Eldon in *Attorney-General* v. *Pearson*, 3 Mer. 409.
† Report of Schools Inquiry Commission. Evidence, Q. 14,154.
‡ *Ibid.* Evidence, Q. 12,762.
§ *Ibid.* I. 589.
‖ *Supra*, p. 35.
¶ Parl. Papers, 1856, xxii. 254.

tion. Such a case was that of Howell's charity, which in 1540 was founded "to marry four maidens every year for ever." They were to be "orphans, honest, and of good fame;" but nothing was prescribed about their creed. By 15 and 16 Vic., c. 14, the charity was diverted to educational purposes, and so fell under the operation of the rule we are discussing.* Another such case was that of the two houses at Burford, which John Hill gave, in 1491, upon trust to apply their rents towards paying any Fifteenths that might be levied upon that town; and the rents of which have recently been diverted to the support of the National School. A still more famous case of such diversion is that of *The Attorney General* v. *Cullum*,† decided by Vice-Chancellor Knight Bruce in 1842. In the reign of Edward IV. a charity had been endowed at Bury St. Edmunds for "the relief of the aldermen and burgesses, and the whole community and poor inhabitants, of the town, in support of the burthens daily falling upon them." In 1842 application was made to Chancery for a scheme for applying this endowment to the foundation of schools; and it was proposed to preserve its unsectarian character by giving a purely Scriptural education to the scholars. Vice-Chancellor Knight Bruce, however, refused to allow this, and directed that all the teachers must be members of the Church of England, and that every scholar must attend the service of that Church twice every Sunday, unless two trustees concurred in giving him a written dispensation. After remarking that any scheme of education without religious instruction would be worse than a mockery, he said: "If education, of course including religious instruction, is to be provided for, I apprehend it must be according to the doctrines and principles of the English Church. I know of no other standard and guide to which the Court can resort." This case has ever since been followed, both by the Court and the Charity Commissioners, whenever new schemes were to be framed. Thus an application was made

* Report of Popular Education Commission, iv. 359.

† 1 Y. and C. 411.

in 1862 to establish a school at East Newlyn, in Cornwall, out of part of the funds of the Trevilsan Charity, a foundation which is of wholly unknown origin, but has always been applied for the benefit of the poor, and without distinction of sect. As a majority—variously estimated at from 65 to 84 per cent.—of the parishioners were Nonconformists, it was proposed that the new school should be conducted on the "British" or purely Scriptural system of instruction. The Commissioners, however, felt that they had no power to establish anything but a Church of England school, with, of course, a conscience clause. They say in their report, "The poor of Newlyn . . . . ask for a school with such religious instruction as they and their co-religionists love and approve of. But the law tells them this is not religious instruction at all, and that (subject to a conscience clause) the school must have Church doctrines taught by Church masters and mistresses, under regulations made by Church trustees."*

Considered as a matter of policy, apart from the intentions of the Founder, the rule appears equally unjustifiable. The practical possibility of giving unsectarian religious teaching to children has been demonstrated by experience; in England by the schools of the British and Foreign School Society and of the local School-Boards, in Ireland by the National Schools, and in Holland by the schools established under the law of 1806. The same experience has equally served to demonstrate that the parents of the children, whilst usually averse to a purely secular system of education, equally usually are indifferent to the introduction of any dogmatic or denominational instruction.† In the case of schools, the rule, it will be seen, is applied even where the Founder has expressed no *prima facie* direction for any religious teaching at all. The law presumes with regard to education that the Founder intended it to be religious, and

* Report of 1868-9, p. 21. It may be noted that the Vicar and churchwardens strongly opposed the conscience clause, and urged the naive plea that their view was that of "the wealthy parishioners who discharge five-sixths of the rates."

† Cf. the Report of the Schools Inquiry Commission, I. 38.

presumes with regard to religion that he intended it to be Anglican. It may be doubted whether the two presumptions rest on equally valid grounds either in point of probability or of policy.

The Court of Chancery in making schemes for religious teaching in the endowed schools whose Founders had prescribed no special form for it, had long been in the habit of qualifying the scheme by the insertion of a "conscience clause." But in 1855 Vice-Chancellor Wood intimated a doubt of his power to allow such a qualification, when it was asked for the Chelmsford Schools. It thenceforward ceased to be inserted in new schemes, until Lord Cranworth carried his Endowed Schools Act, 1860,* which made it compulsory in all endowed schools (except the very prominent ones) that the Founder had not expressly made denominational.

The same legal principle which had thus supplied the Founder's silence by a presumed intention in the question of denominational teaching, and in the further question of a conscience clause, was also employed to limit the governing bodies of endowed schools to members of the Established Church; a question upon which, as upon the other two, most Founders had expressed no desire for restriction.† Thus in 1858 the House of Lords decided that on this presumption Dissenters were incompetent to act as trustees of the Ilminster School, though for a century and a half they had been in the habit of holding that office. Upon a further and cognate question, that of the religious competency of the teachers of the school, Parliament itself had supplied a similar restriction. The Act of 1779, which relieved Dissenting schoolmasters from many of their former disabilities, qualifies the relief with a proviso‡

"That nothing in this Act contained shall extend, or be construed to extend, to the enabling of any person dissenting from the Church of

* 23 Vic., c. 11.

† See Lord Chelmsford's remarks, Hansard clvi. 700; and Canon Robinson's evidence in Parl. Papers, 1873, viii. 137. The Colston School at Bristol is quite exceptional in the stringency of the Founder's expressed Churchmanship.

‡ 19 Geo. III., c. 44, s. 3.

England to obtain or hold the mastership of any College or School of Royal Foundation, or of any other endowed College or School for the education of youth, unless the same shall have been founded, since the first year of the reign of their late Majesties King William and Queen Mary, for the immediate use and benefit of Protestant Dissenters."

We conclude, then, that the intention of the actual Founder of a Charity, whether implied or expressed, constitutes no sufficient warrant for applying its income in perpetuity in any manner that otherwise would be undesirable. But if this be so, assuredly the intentions of other persons cannot constitute one. He may have expressly delegated to others the task of devising the details of his scheme, as when Sir George Downing gave his estates to found a college "upon a plan to be made by his trustees, and approved by the two Archbishops and the Masters of St. John's and Clare;" yet even in such a case the delegate can have no greater power than the principal from which his power is derived. And any man who is neither the Founder nor the Founder's delegate, can assuredly have no claim to impose his caprices upon the endowment and to regulate from his tomb the application of property which was never his. Yet instances are not wanting in which such a claim has been admitted by legislators, and a stranger's wishes have been allowed to institute a permanent restraint upon the free course of a Founder's bounty. Abstractedly considered, these extraneous restraints could not have shown, on principle, any claim to perpetuity; but their sanctity has been confidently asserted when the matter has been dragged from the field of abstract principle to the battleground of hostile sects, and made a point of honour between conventicle and steeplehouse.

In some cases the opportunity of imposing these restraints has been purchased for valuable consideration. An addition is made to the funds of the Charity, and the giver claims as the price of his new gift that he shall be allowed to modify the conditions of the original Founder. Thus the College School at Taunton was founded in 1522, and endowed in 1553, without any religious restrictions or regulations; but

in the present century a gentleman presented it with £500—about one-tenth of its old endowment—on condition that the Anglican catechism should be taught to every boy in the school.*

In other cases the wishes of ancient administrators of the foundation have been regarded as entitled to control the wishes of the modern ones and to limit the freedom which the Founder had conferred. Thus it was provided by the Endowed Schools Act, and again by the amending Act of 1873, that the Commissioners' general jurisdiction to remove restrictions which imposed a religious test upon the governors or the masters of an endowed school might be ousted by the fact of an opposite intention having been expressed (not merely by the Founder himself, but even) by "statutes or regulations made within fifty years after his death."† And even the mere practice of the administrators of a Charity has at times been regarded as adequate to establish a prescription which would restrict the freedom that the Founder had left. Thus the Bill which the late Government introduced in 1874 to amend the Endowed Schools Act proposed to perpetuate denominational religious teaching in every school in which it had prevailed for the past hundred years, "where the original instrument of foundation is silent, or where there is no evidence of its contents."‡ This portion, however, of the Bill did not meet the approval of Parliament. Similarly the City Charities' Commissioners in their Report of last April,§ propose to devote in perpetuity to ecclesiastical purposes all the City charities that "have been for a long period of years applied to such uses, though not specifically enjoined by the will of the Founder."

Again an act of public authority, such as a charter of incorporation or a Chancery scheme, has at times been regarded as a barrier to the legislative revision of rules which it has imposed upon the Charity it regulates. Yet the bulk of such an instrument often expresses only the

* Report of Schools Inquiry Commission. Evidence, Q. 10,358; 10,504; 10,506.

† 32 and 33 Vic., c. 56, s. 19; 36 and 37 Vic., c. 87, s. 6.

‡ Parl. Papers, 1874, ii. 83. § *Supra*, p. 171.

views of the public official who issues it, and not those of the Founder himself. In fact, in some cases the instrument is issued for the express purpose of altering the Founder's original plan; as when the Court of Chancery converted Mr. Betton's unsectarian endowment for the redemption of Barbary slaves into a fund for subsidising twelve hundred Anglican schools.

Yet in the Parliamentary discussions relating to the reform of Emanuel Hospital, we find Lord Cairns treating as of no less sacredness than the Will by which the Hospital's estates were devised, the charter which had been obtained to carry out in detail the scheme indicated in that Will, and contending that "the two documents must be construed together."*

We are brought, then, to the conclusion that the State must never regard itself as permanently deprived of the right to revise any of the regulations to which a charitable foundation has been subjected. We must rather regard the vigilant exercise of that right as one of the State's most sacred duties.

If this be so, we are led to the practical inquiry whether in our own country there exists at the present time an adequate provision for carrying on this branch of the work of government. Apart from the occasional and extraordinary intervention of the Legislature, by such measures as the Endowed Schools Act, a normal and permanent machinery has, as we have seen,† been provided for this purpose; namely, that cy-pres jurisdiction which has for so long been exercised by Chancery. But it is important to observe that this jurisdiction is of too limited an extent to enable the Court to deal adequately with the majority of the cases in which change of circumstances has made a Revision necessary.

For before the Court will thus substitute another charitable scheme for that which was laid down by the Founder, it must be convinced that his is one which it would

* Hansard, ccvii., 881.

† *Supra*, p. 199.

be, not merely (like the old Lurgan Charity for spinning-wheels)* undesirable, but either illegal or impossible to execute. In deciding upon the extraordinary Jarvis Charity, which Sir Samuel Romilly had urged in his argument "is, in effect, a premium upon idleness"—as painful experience of its results has since proved—Lord Eldon replied, "I have nothing to do with arguments of policy. If the Legislature thinks proper to give the power of leaving property to charitable purposes, recognised by the law as such, however prejudicial, the Court must administer it."† (Mr. Jarvis, in 1793, left £100,000 to supply for ever money, provisions, physic, and clothes to the poor of three parishes; whose population in 1801 did not reach 900 altogether. Lord Eldon's scheme was at work from 1802 until it was revised by Act of Parliament in 1852; by which time, as Mr. Hare says, "Idleness, discontent, and improvidence were found to be the fruits of this ill-conceived and ill-judged gift; to which must be added an immorality of life, the results of which are yet distinctly felt." In Lord Westbury's phrase, "the water of charity was so abundant that it drowned the land.")

So, too, if a Charity has been established in a place which ceases to need it, the Court cannot remove it to another place where the evil the Founder sought to cope with is still rampant. Mr. Fearon ‡ mentions the case of a Charity founded in a little parish in London. Almost the whole parish was, in course of time, pulled down to make room for the General Post-office; but there was a little left. The Charity had been given for poor householders; it was now found that there were no poor householders in the parish. It was then varied by the Court for poor people. After a time it was found that there were only two poor people in the parish. The Court was then asked to remove it to Bethnal Green, or to some of the extremely poor districts in the neighbourhood of the Post-office; but the cy-pres jurisdiction of Chancery proved to be too limited to enable

* *Supra*, p. 162. † *Bp. of Hereford*, v. *Adams* (7 Ves. 329).

‡ Report of Schools Inquiry Commission, Evidence, Q. 13,359.

it to do this. This power of varying the locality of a Charity is essential to the efficiency of any Revising authority. The Endowed Schools Commissioners were enabled by Parliament, as was tersely said, "to take a girls' school in Northumberland and make it a boys' school in Cornwall." Similarly, if time has produced a change in the relative value of two charitable funds created by the same act of Founder, but with distinct trusts, as where (in an instance already cited *) a trifling residuary gift comes to exceed in value the specific sum which he devoted to his more important object, it is very doubtful if Chancery has any power to readjust their proportions; and it certainly would not be done in a contested case.† So, again, in the case of the Chester Charity of which we have already spoken,‡ which is enjoyed by useless corporations that are kept in existence solely for the purpose of enjoying it, the Charity Commissioners§ report that "Mischievous as the effects undoubtedly are, the evil in the present state of the law is virtually irremediable. For so long as these Companies, which are the declared objects of the foundation, shall continue to exist, no scheme can be established, either by the Court of Chancery or by our Board, which shall have the effect of compulsorily depriving them of its benefits, and of transferring the endowments to really useful objects. Nor should we expect (with the experience we possess) that any Legislative scheme proposed by our Board for a similar object would succeed, in the face of opposition from persons interested to maintain the existing state of things.‖ The result is, that an endowment, which, if placed under effective regulation, might furnish largely the means of advancing the welfare of the industrial classes in the important town for whose benefit it was designed, will, unless some other Legislative remedy shall be applied, continue to operate to the degradation only of its recipients."

Again, as the very title of the "cy-pres" rule implies, the Court considers itself bound, in making any new scheme, to

* *Supra* p. 178.

† Report of Schools Inquiry Commission, Evidence, Q. 13,256.

‡ *Supra*, p. 161. § Parl. Papers, 1873, xxvii. 18. ‖ Cf. *infra* p. 226.

sioners report that "Our witnesses generally agree in stating that the cy-pres doctrine is very uncertain and capricious."‡ Sir Roundell Palmer, for instance, had said to them, "I have no doubt at all that the cy-pres principle is practically very

* Lord Hardwicke directed such a bequest (it being then illegal, as intended to promote anti-Christian education) to be applied in aid of the Foundling Hospital. Lord Hatherley says "It would probably have surprised the testator, could he have known that this was considered as executing his intentions as nearly as possible." (*Transactions of Social Science Association*, 1859, p. 188.)

† *Att.-Gen.* v. *Ironmongers' Company* (1 Craig and Phillips, 227).

‡ Report I. 449.

arbitrary and indefinite."* The Charity Commissioners similarly complain of "the indefinite character of the rule, and the difficulty of reconciling it with the actual practice of the different branches of the Court of Chancery—an incertitude to be much regretted in itself, and peculiarly embarrassing to the exercise of any jurisdiction from which an appeal may be made to one or another branch of that Court selected by the appellant."† And they protest against its "prohibiting the establishment of any scheme involving a substantial departure from the declared intentions of the Founder, whatever may be the balance of convenience or social advantage in favour of the change." Apart, therefore, from all considerations of the expensiveness‡ of Chancery as a Revising authority for obsolete Charities (many of which are of so trifling an amount), the limits of its power of revision, and the direction in which it must exercise that power, seem alike to be undesirably restricted.

It appears, now at last, to be conceded upon all hands that a revision has become indispensable in the case of many charities which no straining of the cy-pres rule would suffice to bring within its limits. Such a revision, too, should be effected by a general and systematic course of periodical reform, operating throughout the country at large, and not, as hitherto, by a mere series of surprises.

We have already pointed out the necessity of postponing this revision of each Charity until after the lapse of some time from its establishment; in other words, of conceding to every Foundation which deserves to be permitted to come into existence at all, a Term of Inviolability, during which the Founder's experiment may have an adequate trial. Without such a concession it can scarcely be expected that many men would care to devote their property to public

* *Ibid.*, Evidence, Q. 14,172. † Parl. Papers, 1867, p. 4.

‡ The cy-pres jurisdiction of Chancery is, however, at the present day no longer open to the old charge of dilatoriness. In the recent case of the Cannon Street Chapel, at Birmingham, a petition for a scheme for the cy-pres application of a fund in Court to new trusts, was presented on the 19th of March; and the Order was made, and the money received out of the Paymaster-General's hands, before the last week of May.

uses. Without such a concession, moreover, it is to be feared that the prepossessions of official routine would prematurely cut short the workings of the most novel and suggestive Foundations.

As to the exact length of the term to be conceded, widely different suggestions have been made, ranging from twenty-one years to one hundred—which latter period Mr. J. S. Mill seems to have been willing to allow in at any rate certain kinds of Charities.* The period of sixty years was proposed for inefficient (as distinguished from injurious) Charities by Lord Cranworth's Bill of 1853.† The Schools Inquiry Commission proposed that the power of revision should extend to all Foundations that were more than thirty years old; whilst Sir J. K. Shuttleworth, in his evidence before them, had suggested sixty, and Lord Hatherley fifty years. This last-mentioned period was, as we saw, adopted in the Oxford University Reform Act of 1854,‡ which empowered the University to frame statutes for modifying the trusts of any gift held by it "which has taken effect for more than fifty years;" and in the Endowed Schools Act of 1869,§ which empowered its Commissioners to alter the constitution of existing educational endowments more than fifty years old without the consent of the governing body, and of more recent ones with that consent. This period was approved by Lord Lyttelton, when giving evidence, as a Commissioner, upon the working of the Act.‖ The Dissenters' Chapels Act¶ took the briefer period of twenty-five years; but it was, as is too often forgotten, not a measure for altering the expressed intentions of the Founders, but for abolishing a judicial interpretation by which their wide expressions were restricted. The period of thirty years was recommended by the Law Amendment Society's Committee on Charities. The Popular Education Commission** recommended the more variable but more familiar limit of the Founder's life and twenty-one years after his death,

* *Fortnightly Review, XI.* 381. † *Infra*, p. 218.
‡ 17 & 18 Vic. c. 81, s. 30. *Supra*, p. 195.
§ 32 & 33 Vic. c. 56, ss. 9, 10. ‖ Cited in Hansard ccxxi. 1131.
¶ 7 & 8 Vic. c. 45. ** Report I. 636.

revision during the twenty-one being, however, permissible if the unanimous consent of all the Trustees were obtained.* This limit was recommended by Lord Hatherley in his evidence before the Public Schools Commission, for the sake of preserving uniformity with the rule which restricts private settlements.

The principle of all these plans is of course the same—that the Founder's directions shall cease to be irrevocable as soon as the period has expired during which there was a reasonable chance that he, if a reasonable man, would have been able to foresee their effects.

That period it is of course impossible, under ordinary conditions, to ascertain with precise accuracy, even in an individual case; and any period that the law may fix will be at best a mere approximation. In some instances, of course, the occurrence of an unexpected physical or political revolution may so alter the surroundings of an endowment that its effects thenceforward become such as no Founder can reasonably be supposed to have anticipated. In such a case the problem is simplified, and it ceases to be necessary to gauge the recentness of the Foundation. The Toleration Act was a revolution of this kind, so far as regards all directions for religious education in ordinary endowed schools; and was treated as such in the Endowed Schools Amendment Act of 1873. The University Tests Act was a revolution of this kind, so far as regards all Nonconformist colleges.

But in the great majority of cases no such sudden rupture interposes any natural boundary line. In the attempt to supply an artificial one, the chief point of principle for consideration is, whether it shall be simply numerical, or shall introduce the variable element of the Founder's life. The latter proposal has considerable value as an inducement to Founders not to make merely posthumous gifts, but to establish their Foundations whilst they are still alive. The eye of a living Founder is a better security for effective administration than any official Board can provide. The advan-

* Report I. 548.

tage of his personal supervision is so great that it may well justify the addition of the whole residue of the Founder's life —which probably would seldom exceed twenty years from the date of the Foundation—to whatever numerical Term of Inviolability is conceded to posthumous endowments; especially as experience seems to show that the capricious or injurious Foundations—those which would soonest need the exercise of the power of revision—are usually created by Will. But if this inducement (which of course might, in some rare cases, enlarge the term by fifty years) were considered an excessive bribe, two alternative Terms, as in the Copyright Act, might be given, and endowments be declared unalterable—except, of course, by the Founder's own assent —for (say) fifty years from their establishment, or for the Founder's life and (say) forty years from his death, whenever this latter period should exceed fifty years.

It does not seem desirable to make the Term of Inviolability depend upon so variable an element as a human life in any case, except that of the Founder's own life. If the plan were adopted, even in the case most nearly akin to this, that of the lives of the Trustees originally chosen by the Founder, it would have the disadvantage of inducing the Founder to select as Trustees younger and therefore more inexperienced men. The lives of the original recipients of the charity will scarcely be suggested as a basis; for though they have a direct interest as to the time at which any scheme of Revision takes effect (and their vested rights must of course be fully respected in any such scheme), they have no claim to be considered in determining the time at which such a scheme may be framed.

So far as the extent of the purely numerical period is concerned, no general considerations of principle will suffice to determine it; and each State, will probably be guided by mere love of symmetry to take some number which has already become familiar in its law of Prescription. Considerations of principle, varying with the different conditions of different nations, may, however, become important in deciding whether the numerical period is to be the same for

all charitable Trusts. It is clear that some of the common details in Foundations, like preferences of locality, or restrictions as to dress or diet, tend more rapidly than others to grow obsolete. It is also clear that even amongst Foundations unfettered by detailed directions, there are wide differences of vitality. A school is likely to be valued and valuable much longer than an almshouse; and an almshouse much longer than an endowment for providing marriage portions.

Lord Cranworth's Bill of 1853, in its original form, would have conferred upon the Charity Commissioners a remarkable power of revision, under which charities deemed by them injurious or obsolete, would have obtained no Term of Inviolability, while a term of sixty years would have been conceded to charities that were merely nugatory. Schemes might be made:—

"For the application of any charitable funds to such charitable purposes, and in such manner for the promotion of charitable purposes, as the Board may think fit (although such purposes or such manner of application be not authorised or be not in all respects authorised by the term, of the trusts affecting such charitable funds) in the several cases hereinafter mentioned; viz. (that is to say):

Where it appears to the said Board that the charitable purpose for which the fund has been given by the founder has failed:

Where the said Board are satisfied that the fund as administered according to the charitable trust affecting the same creates or increases pauperism or immorality:

Where in the opinion of the said Board the fund of any charity administered separately is insufficient for the purposes for which it was given by the founder, but may under a scheme approved as aforesaid, be effectively employed in union with or in aid of any other charity whether supported by endowment or by voluntary subscriptions, or partly by endowment and partly by voluntary subscriptions, or in extending the benefits of any such other charity:

Where *in the case of any charity founded more than sixty years* before the approval of the scheme in relation thereto, the said Board are satisfied that the charity has no beneficial results, or that the benefits are insignificant, having regard to the income thereof, and that the income of such charity may, under a scheme so approved as aforesaid, be beneficially applied to other charitable purposes in the district or districts where it is administered."

Every such scheme, if approved by the majority of the governing body of the charity, was to be laid before

Parliament, and after three months was to take effect unless in the meanwhile either House had voted a resolution against it. If the scheme had not been thus approved by the governing body, it might be laid before Parliament, but could only take effect by passing through all the stages of an ordinary Act.

The Bill, in a modified shape, was adopted, and constitutes the great Charitable Trusts Act of 1853—the consummation of Lord Brougham's forty years' struggle to secure the public Supervision of public endowments. But this clause facilitating their Revision was cut down; and every scheme, whether approved or not by the governing body, was required to pass as an ordinary Bill.* We shall see how completely ineffective the power, thus reduced, has been found.

The restoration of its original form has been urged by the Charity Commission.† But in any such restoration it may be doubted whether the dissent of the administrators should be made to affect the validity of a scheme of revision, except during the first generation of them. Subsequent Trustees know no more than the Revising Authority does of the wishes or beliefs of the Founder, and know much less of charitable economy. A recalcitrant set of Trustees would indeed work the revised foundation in an unsatisfactory manner; but this is rather a reason for changing the Trustees than for refusing to change the Foundation.

It is of course possible—and if the Founder devised his original plan with prudence it will be highly probable—that even when the Term of Inviolability is over, the Revising Authority will find no part of the Foundation grown obsolete and will have no change to make. But if the ruins of time should be already apparent, what course must be pursued?

Some persons will perhaps contend that if the Foundation cannot be suffered to continue as it is, the only honest course will be to declare the public ownership to be at an end, and to restore the endowment to the Founder's heirs. "If," they

* 16 and 17 Vic. c. 137, ss. 54-60. *Infra*, p. 225.

† Parl. Papers, 1867, p. 4.

may say, "you choose to set aside his will, the logic consequence is that you must treat him as intestate. Yo have no right to make a new will for him, and to compe him to be charitable in your way instead of his own."

"To set the giver's dispositions aside, except at th command of a still higher principle, is an offence bot against Liberty and against Property," says Mr. J. S. Mill.

The practical reply of course is, that the very existence o the Foundation shows that in the Founder's own opinio his heirs stood in no very pressing need of his property that a scheme expressly devised by a Board of experts ha every chance of rendering the property eminently benefici to the public; whilst, if the property were instead to reve to the heirs, it is highly doubtful if it would be of an benefit to them. The sudden and fortuitous accession to family, of property which for thirty, forty, or fifty yea past none of their members have had any reasonable expe tation of obtaining, seldom results in their permanen advantage. Wealth is but little of a blessing except whe its acquisition has been preceded either by the energy t win it or by the education to wield it. No more cruel kin ness could be conferred upon a family than to dangle befo their eyes, for a whole generation or more, the vague chan of a reversion, a fortune which most probably would nev fall in, and which, if it fell in, would do so independentl of their deserts, and would probably be utterly dispropo tioned to their needs, their rank, and their education. Founder's kinsfolk will frequently be his social inferior It must always be remembered that most of our endow ments are created from the newly won wealth of th trading classes. "Soon come, soon gone," is a financia proverb which is exemplified in hospitals and asylums, a well as in the cellar, the stable, and the greenroom.†

* Fortnightly Review, xi. 380.

† "When," says Lord Brougham, "we inquire from whence proceeded thes magnificent endowments, we generally find that it is not from the bounty o those who, possessing princely revenues, were anxious to devote a portion o them for the benefit of mankind—nor from those who, having amassed vas fortunes by public employment, were desirous to repay in charity a little o

Moreover if the first generation of Trustees, the Founder's own friends, saw this reversion hanging over the property, their respect for the contingent interests of the reversioner would often undesirably fetter their action in the administration of the charity property.

We may assume, then, that the property thus diverted from the particular public uses which the Founder designed is still to remain public. But is any further restriction to be imposed? Some writers would be content to leave the property at the uncontrolled discretion of the Revising Authority, not indeed to sink as public money into the public exchequer, but at any rate to be a quasi-public fund, out of which the unfettered discretion of the moment may carve what scheme of general advantage it may choose. Endowments are not merely to be alterable as opinion alters, and variable as their surroundings vary, but are to become absolutely dependent *arbitrio popularis aurœ*.

To such a course there are two potent objections. The first is the argument, already familiar to us, from Discouragement; the fatal effect of such a course in deterring men from creating new Foundations. The second is drawn from the interests of the Foundations that already exist. To place them in this way at the disposal of the State, or one of its official Departments, without even a hortatory restriction, is to throw a fatal temptation before every embarrassed financier. The moment that a spirited foreign policy, or a confused domestic one, produced fiscal complications, and made his approaching budget a puzzle to him, a *Pactolus ex machinâ* would be found in the endowments. The interests of charity and of sociological experiment would be forgotten in the face of a deficit; and the Commissioners would be called on for a schedule of the Foundations whose Term of Inviolability was over, and whose hour of

what they had thus levied upon the State. It is far more frequently some obscure personage, some tradesman of humble birth, who, grateful for the education which had enabled him to acquire his wealth through honest industry, turned a portion of it from the claims of nearer connexions to enable other helpless creatures in circumstances like his own to meet the struggles which he himself had undergone." (*Parl. Debates*, xxxviii. 610.)

revision had come. There is little fear that any of them would ever grow obsolete again.

It would therefore be necessary in constituting the power of Revision, to provide that the readjustment of the property shall always be such as to leave it devoted to public uses of a permanent character. Its perpetuity—which our full powers of Supervision and Revision will have deprived of its evils—must be jealously maintained. The State must remain mere guardian and not become a free proprietor. Moreover, to meet as far as possible the former argument drawn from Discouragement, it will be desirable that these permanent public uses shall correspond to some extent with those indicated by the Founder. This might be done by a general direction that the Revision should correspond as closely as possible with the general intention of his original scheme. But it is probable that such a direction would work but ill, and would be made to restrict too closely in some cases, and hardly treated as of any effect at all in others. We have already seen how unsatisfactory has been its working in the cy-pres decisions of Chancery.*

It will be desirable to embody the restriction in a more definite form. The first rule should be that any name which the Founder has connected with the institution must be preserved; for its preservation can cause no evil, whilst the security of its being preserved is perhaps the most potent of all encouragements to Founders.† It is not equally necessary to extend this immunity to any other memories which the Founder, in the hope of perpetuating them, may have connected with his Charity; but in cases where the endowment is of substantial value, and the memory is worthy of such preservation, it will be desirable to do so. We may safely disregard the wishes of Thomas Nash, whose bequest to the ringers of the Abbey Church at Bath was made on condition that they should ring muffled peals on the anniversary of his wedding-day, and joyful peals on the day of his decease, "in joyful commemoration

* Supra. p. 213. † Supra. p. 103.

of his happy release from domestic tyranny and wretchedness." On the other hand some respect is due to Moses Edwards' direction that his yearly five pounds' worth of coals should be distributed on the anniversary of the passing of the Reform Bill of 1832, * or even to gifts which commemorate the Restoration of Charles II.† More doubt may be felt about the need for preserving to Margate her annual 50s. for a peal of grandsire triples to commemorate the accession of George the Fourth.‡ Mere whims may be of course disregarded, like that which directs an annuity to be distributed at Danby, in Yorkshire, on the ninth day of every month to nine poor people at the rate of ninepence a week.§

Beyond this rule of preserving names and memories, the only point is, to confine the endowment to the particular province of charity for which it was originally intended; whilst treating all the details and expedients of the original plan as freely alterable. We must adhere to the Founder's meaning, though we may discard his means. It will not be too close a restriction to cognate purposes if we require all endowments given to educational purposes to be restricted to education, since no condition of society is at present conceivable in which an educational charity, properly supervised and periodically revisable, can fail to be of public advantage. In like manner gifts for sanitary, for artistic, or for scientific benefits, should respectively continue to be so applied. This principle was aptly exemplified when the endowments of the obsolete Lepers' Hospital, at Newcastle, were applied to support a seaside hospital for scrofula. A gift for the relief of indigence should be still devoted to the indigent; though with power to apply it to mental instead of physical wants, to elementary schools for example, though certainly not to secondary ones. In like manner a religious endowment should be still devoted to

* At Lugwardine, Herefordshire; (Thirty-second Report of Inquiry Commissioners, 2.135.)

† Tenth Report, p. 15; Twelfth Report, p. 39.

‡ Thirtieth Report, p. 558. § Seventh Report, p. 715.

spiritual purposes; and (it will probably be necessary, for many generations yet, to add) to the same purposes, though not necessarily in the same locality, as the Founder directed. So long as the nation is divided into many faiths, and the law sanctions them all, it is scarcely possible for any authority but the supreme Legislature to venture upon so delicate a task as the modification of a religious endowment, except when (which the endowment will usually render impossible) no one can still be found to profess that religion. When the State permitted only one faith, the problem of course was simple. If ever the introduction of a Baconian method into theological research should produce Baconian results, and the concurrence of all competent judges should again render only one faith possible, the problem would again be simple. That time must, indeed, remain remote, so long as one part of the world continues to regard theology as a subject unworthy of investigation, and another part to regard it as a subject which is only to be investigated in an unscientific manner. But till that time arrives, the doctrinal limits of religious Trusts must remain unmodifiable; and the only practical question for the State must be, whether it will permit the creation of unmodifiable limits. "No perpetuity," to use Sir John Lubbock's words, "is so bad as that of an untenable opinion." To this danger of 'Obsolescence' in religious endowments, the same remark applies which we have already made* with reference to their 'Caducity'—namely, that the evil, as being less readily remediable, is more serious in the case of unestablished churches, where the State has no special right to interfere, than in that of an Established Church, which is peculiarly under its control. Strong as is the feeling in the State of New York against the ownership of landed property by religious bodies, the Legislature has not ventured to compel the Reformed Dutch Church to turn its valuable estates into personalty, though such a measure would undoubtedly have been carried if that Church were still, as it once was, the established religion of the State.

* *Supra*, p. 14.

It will be scarcely possible to require the Revising Authority to respect the Founder's preferences of locality. They must be left to the general rule that all his directions though no longer determining elements, are still elements to be considered. But his expressed preferences of nationality, of sex, and of great classes—like the agricultural or the mercantile—may fairly receive imperative perpetuation.

When circumstances have so completely changed that even these wide limits of purpose have become inapplicable, the time will have arrived for the action of the supreme Legislature, which created this system of Revision, to be invoked to supersede it.

Beyond this there is a further question, already settled in the minds of almost all theorists, which now presses upon the attention of practical statesmen;—whether that revision must still be reserved as the extraordinary function of the Legislature, or whether it may not be permitted to take its place as one of the normal duties of some administrative department or judicial tribunal.

An intermediate step was taken in 1853,* in the hopes of reserving the exclusive authority of Parliament and yet facilitating its exercise, by authorising the Charity Commission to submit to Parliament schemes for the revision of endowments. But the experience of a generation has proved this experiment to be a failure, and the Commissioners seem to have abandoned all intention to act under it. The supreme Legislature is, indeed, utterly unsuited to act as a final Court of Appeal upon these delicate questions of administrative detail. It has not the time to discuss their minutiæ; and its supervision therefore degenerates into a mere lottery of vetoes and blanks, especially at the end of the session. It is curiously susceptible to local pressure; and no scheme for the revision of an obsolete or corrupt charity can possibly be prepared without irritating some local interest.

The schemes, when they have been settled by the Charity Commissioners, must be passed through Parliament, through

* 16 & 17 Vic. c. 137, ss. 54—60.

all the stages of a bill. The only advantage conferred by the provision of 1853 is that the schemes are relieved from the payment of fees, and from being sent before a Committee of the House like a private bill. Mr. Lowe* gives it as the result of his experience as a Charity Commissioner, after attempting to carry several of these schemes through Parliament, "that they really only can be worked by consent. There is nothing before Parliament to guide it as to details; no evidence is taken, and there is nothing but the report of the Commissioners on the scheme. The consequence is that if anybody gets up and objects to the details. it becomes a mere question of statement and counterstatement between him and the person who has charge of the bill. Parliament naturally does not like to decide, and the thing falls through."

The consequence has been that, as the Commissioners complain, "Schemes elaborated by us, after careful inquiry and consideration, and calculated in our judgment to produce much local and general benefit, have failed to be submitted to Parliament in the face of vehement opposition of interested parties. We have possessed no means of ensuring to other proposals the effective support which they have appeared to ourselves to deserve, and without which they have failed; whilst other measures which we have felt it our duty to recommend have been discountenanced on their proposal to Parliament, under circumstances peculiarly embarrassing to us."†

In 1870 they say: "The conclusion has been forced on us after many earnest endeavours, that the attempts to obtain the establishment of legislative schemes in the face of opposition, involve a waste of public time. . . . The proposal, if encountered by opposition, nearly always fails of effective result."‡

In their Report of 1872, they say: "New cases are constantly brought under our notice, in which charitable endowments (frequently of considerable value) are expended

* Report of Schools Inquiry Commission. Evidence Q. 6547.

† Parl. Papers, 1867-8, xxi. p. 20. ‡ Parl. Papers, 1870, xvii. 18.

without advantage, if not with positive evil to the community, by reason of the obligation which the existing law imposes upon their administrators, of adhering to all obsolete or antiquated trusts. We are repeatedly compelled to feel even painfully our present powerlessness to ameliorate this evil. We are, indeed, authorised to propose, but have no effectual power to promote, legislative schemes for the new application of endowments; but the unsuitableness of that mode of procedure for the accomplishment of its objects has been ascertained, according to our experience, and before commented upon by us. We have not thought it advisable to have recourse to it during the past year."*

Mr. Lowe proposes as a remedy that since these schemes "are really only available in cases of consent, it would be quite enough if they were to lie on the table forty days; and in case they were not objected to were to become law without burdening Parliament to go through them—which is merely an empty form, if there has been any serious opposition they have always been dropped."†

But the action of a Parliamentary veto on the work of so peculiarly expert a tribunal as the Charity Commission can seldom be of a desirable character. Parliament may insist on retaining its veto on the operations of the Commission. But so long as the moral feeling of the community sanctions the operation in Parliament of private influences which it would be thought disgraceful to bring to bear upon a judicial tribunal or a board of public officials, so long this veto will be a perilous power. If any veto be necessary, it might more safely be intrusted to the more impartial hands of the Judicial Committee of Privy Council. If it continue to be entrusted to Parliament it should only be upon the understanding that it is to be no more than a reserve force, capable of being put in action under the pressure of an extreme emergency, but not likely to be used more frequently than the corresponding power of the Crown in matters of general legislation. Or still fuller precaution

* Parl. Papers, 1872, xviii. 21.

† Report of Schools Inquiry Commission. Evidence Q. 6547.

might be taken by providing that the concurrence of both Houses of Parliament should be essential to make a veto effectual.

The great majority of the charities which require revision are individually of a value too petty to justify the loss of public time involved in moving addresses to the Crown to protect them from revision. They are at the same time so many in number that their revision ought not to be left to the chance of extraordinary legislation in individual cases, but should be rendered the periodical and normal duty of some public department. Its regular exercise might be secured, and piecemeal *ex post facto* legislation prevented, by reviving a clause from Lord Lyndhurst's Bill of 1845 (s. 53), which required his proposed Commission to report triennially to the Crown as to the Charities which they found had become injurious, or had ceased to be beneficial, or required to be reformed or regulated.

It is imperatively necessary that the primary Revising authority should not be regarded as a mere tribunal of reference, to which petitions for the reconstitution of a Charity may be addressed by the Trustees, or even by outsiders; it must, as a branch of the executive government of the State, have full power of initiating schemes of Revision in all cases where it may find that they are needed. This right of initiative is essential, not merely to prevent the possibility of the Powers of Revision remaining entirely unexercised, but also to give their exercise a character of completeness. Without it, the charities can only be dealt with individually, as applications happen to be made; yet the working of one Foundation often has so close a connection with that of one or more of its neighbours, that if the one is to be effectually revised some correlative change must be made in the constitution of the others. One great defect in the cy-pres jurisdiction of Chancery has been, that the revisions effected by it can only be of this piecemeal character.

The Charity Commissioners say, "There is no doubt of the expediency of utilising for the public benefit the large

amount of charitable endowments which are at present unprofitably or even prejudicially expended upon objects which a more enlightened experience has justly condemned; but we venture to think that the true remedy for the evil will be found, not in the selection of particular cases for special and exceptional legislation, but in the judicious relaxation of the rule of law by which the founders of charities are enabled to attach to these endowments perpetual trusts which shall not be open to ample modification in the interests of society."*

And again, they say, "If a declaratory enactment were passed, to the effect that all tribunals having power to establish schemes, shall be at liberty to take into consideration the propriety of effecting the modification of any provisions of the original trust, which by reason of the lapse of time or change of circumstances shall appear to be no longer calculated to promote the substantial object of the foundation, we should confidently anticipate that this wise extension of power would be followed by a progressive amelioration of the management and application of these endowments, which being effected through existing agencies and a familiar course of procedure, would to a great extent be exempt from the distrust and apprehension that may be attached to any sweeping or sudden change, and are found not unfrequently to create serious impediments to its success."† (The allusion is, no doubt, to the Endowed Schools Act.)

It must further be considered whether these powers of Revision should be entrusted, like the present cy-pres jurisdiction, to an ordinary *judicial* tribunal. To the existing tribunal there is the special objection that the multiplicity of equity judges of first instance produces discordance even in contemporaneous decisions. Whilst to employing any ordinary court for the purpose there is this general objection, that the power of revision is not so much a judicial as a legislative or an administrative one. The Revising Authority must constantly be readjusting its

* Parl. Papers, 1867-8, xxi. 21. † Parl. Papers, 1873, xxi. 18.

own rules of working, and must frequently act upon individual cases independently of rule. But courts of justice are accustomed to limit their action by scrupulous deference to precedent rather than to direct it by the latest results of a constantly accumulating experience. Their attention is necessarily fixed upon positive jurisprudence rather than upon speculative legislation, upon the past rather than upon the future. "Their habits," as Lord Westbury says, "unfit them for those large views which should regulate the exercise of such powers."* The very habits of mind that qualify them to enforce the execution of Trusts, disqualify them for adjusting the revision of those Trusts. And even if in dealing with the subject of Charities they should consent to waive to some extent their traditionary habits, and introduce into their rules that greater degree of flexibility which would keep them constantly in harmony with the advancing doctrines of political science, it would be unfair to expect judicial functionaries to keep themselves informed of these doctrines for the purpose of discharging one small section of the business of their courts. A man may be a successful lawyer or even a successful judge without having applied his mind to questions of moral or economical controversy. Mr. Fearon says that he finds a remarkable difference between the schemes for management of charities which are framed by judges who have acted as Attorney-General and thus obtained special acquaintance with charity difficulties, and those framed by judges who have not.† On the other hand, an authority formed for the exclusive purpose of dealing with charity questions would rapidly amass the means for a thorough knowledge of the subject of charitable economy, as well in its most general principles as in its minutest local details; as the twenty-six years' experience of the present Commission suffices to show. "It is not too much," they remark, when suggesting that they should be made

* Report of Schools Inquiry Commission, Evidence, Q., 16,634; cf. Sir Roundell Palmer's evidence, Q. 14,178.

† Ibid Q. 13,415.

parties to all equity proceedings which affect a charity, "to say that in every instance in which proceedings relating to a charity now come before the courts there exists among the records of our office much information bearing upon the questions at issue; whilst in the vast majority of cases those questions have already, in some form or other, been submitted to, and to some extent dealt with by, us."* The important precedents of the University Commissions, the Endowed Schools Commission, and the Charity Commission, are perhaps sufficient to justify us in regarding it as being now a settled principle of the Legislature, that the task of revising Foundations is one which must be intrusted, not to an ordinary judicial tribunal, but to a body of experts.

Moreover, not merely will questions of Charity Revision demand a species of knowledge and a mode of treatment which must be expected from a special administrative department rather than from a court of justice, but it will also be necessary to deal with them in close connection with the general administration of the country at large. The Revising authority must be in constant communication and cordial co-operation with the Home Office, the Local Government Board, and the Education Department, that its action may be well directed and well timed. It must know where the failure of an industry—as at Middlesborough during the past year—has produced a state of distress with which the ordinary local resources are inadequate to cope. It must know where the sudden expansion of an industry has produced an influx of population which needs better houses, and more schools, and churches, and allotment gardens, than its local resources are as yet sufficiently developed to supply. It must, in short, in the glowing words of Burke, "take the guage and dimensions of misery, depression, and contempt; remember the forgotten, attend to the neglected, visit the forsaken; and compare and collate the distresses" of all its countrymen of every place and class. Moreover, if the ultimate veto upon each scheme of Revision should continue to be left in the hands of

* Parl. Papers, 1878, xxiv., 20.

Parliament, as at present, it becomes especially desirable that the Revising authority should be brought into direct connection with the Ministry of the day, that it may learn what schemes would be likely to be successfully carried through Parliament, and that it may get help in carrying them through.

But, as has already been said, it is much to be desired that the ultimate veto should be intrusted to some body less susceptible than Parliament to the clamour of local interests. The Privy Council, with its remarkable combination of the best business men of all political parties, has naturally been looked to for this purpose—as in so many previous instances, where it has acted as the "nursing mother" * of some new object of governmental effort. It is needless here to enter into the discussions that have taken place as to the propriety of entrusting these revision appeals to the Judicial Committee—who have already, in the extension of Patents, an authority which is discretionary rather than judicial—or (as proposed by the Popular Education Commission†) to the Education Committee, or of creating for the purpose a new Committee of Council,‡ whose head should be a Cabinet Minister, responsible to the Crown and to Parliament, and should, if necessary, be also the head of the Ecclesiastical Commission. Any one of these Committees would be preferable to Parliament, as well on account of its inaccessibility to local pressure, as on account of its permanence, which would preserve the experience of each appeal to aid in the settlement of future ones.

The authorities, primary and ultimate, thus entrusted with the duty of revising Charities, would naturally also be entrusted with the cognate duty of deciding on the propriety of accepting, at its outset, each new Foundation,§ (if the State should create that discretionary power.)

It may, perhaps, be suggested that an exemption from the jurisdiction of this general Revising authority should

* Helps' *Thoughts upon Government*, chap. x. † Report I. 536,540.

‡ For Sir J. K. Shuttleworth's plan, see the Report of the Schools Inquiry Commission, Evidence, Q. 17,568. For the recently created "Universities Committee of the Privy Council," see 40 & 41 Vic., c. 48, s. 44.

§ *Vide supra*, p. 36.

be conceded to those endowments whose Founders had created adequate powers for their periodical revision either by the administrators themselves, or (which we shall find to be far preferable) by some official authority. Such powers are not without ample precedent.

It is not merely that some Founders have indicated an ulterior purpose to which their endowment should be applied, if its primary one should ever become obsolete. Such were the clauses sometimes inserted in the Trust-deeds of Non-conformist chapels built during the first half of the last century, to provide for the appropriation of the edifice, should Dissenting worship again become illegal.* Such was the clause by which Dean Swift, when making a devise to augment the income of the Vicar of Laracor, provided that it should hold good only "so long as the present Episcopal religion shall continue to be the national established faith and profession in this kingdom; but when any other form of the Christian religion shall become the established faith in this kingdom, I leave the said tithes to be bestowed to the poor of the said parish of Laracor . . . while Christianity under any shape shall be tolerated among us."† But a far more important step than this has often been taken by other Founders, in conceding to future generations a power of readjusting the constitution of their endowments repeatedly.

Thus the Founders of many of the old Grammar Schools conferred, either upon their own heirs or upon the Governors of the school, a power of revising its statutes, subject to the consent of the Visitor; though the power was seldom sufficiently extensive to enable them to keep the school really abreast of contemporary needs and circumstances. The most famous instance is that of Dean Colet, who, in founding St. Paul's School, declared thus in his Ordinances:—

"Bothe alle this that is saide, and all that yet is not saide which hereafter shall come into my mynde while I lyve to be said, I leve it

* *E.g.*, the Presbyterian Chapel at Framlingham (A.D. 1731), Green's *History of Framlingham*, p. 233; Carr's Lane Chapel, Birmingham (A.D. 1746), *Life of J. A. James*, p. 46. For the validity of these remainders, remote though they are, see 1 Mac. & G., 460.

† Scott's *Life of Swift*, p. 521.

hooly to their discretion and charytte, I mean of the wardens and assistants of the fellowship, w^t^ such other councill as they shall call unto theym, good lettered and lerned menne. They to add and dimynyshe vnto this boke, and to supply in it every defaulte, and also to declare in it every obscuritie and darkeness, as tyme and place and just occasion shall requyre, callying the dreadfull God to loke upon them in all such busyness, and exhorting them to fear the terrible judgement of God, whiche sitteth in darkness, and shall rendre to evry man according to his workes; and finally praying the grete Lorde of mercy for theire faithful dealying in this matter, now and always to sende unto theym in this worlde much welth and prosperyte, and after this lyff much joye and glory."

The power of revision thus given in 1511 was exercised as early as 1602.

Several more recent instances might be cited, like that of the Hibbert Trust, which Professor Max Müller's lectures have recently brought into notice.* Mr. Cumin goes so far as to say that, in modern endowments, it is "*not uncommon* to provide that, at intervals of twenty years, the Trustees for the time being shall be at liberty to alter the trusts upon which the fund is held."† Sir Joseph Whitworth, when devoting £3000 a year to his Scholarships, in 1868, provided for the constant readjustment of his scheme by the Vice-President of the Education Committee. In another recent case, £15,000 was given to educational purposes, with a condition that the Foundation should be revised every half century by the Charity Commissioners, and applied to the best uses for which it could, at that time, be employed.‡

In these latter cases, in which the duty of Revision is

* Mr. Hibbert's deed of gift contained the following power of revision :— "I hereby direct and require the Trustees for the time being of this deed, after the death of myself and my wife, from time to time, as often as they shall think fit, and once at least in every quarter of a century, to revise and thoroughly reconsider any and every scheme they may have adopted, and shall from time to time have acted upon, for carrying the said trust into effect; and thereupon to adopt and act on any entirely new scheme with any alterations or without any alteration, as they (profiting by experience, and under the altering circumstances of more advanced times, *and after inviting by public advertisement, and duly considering the suggestions of others*, but still in the absolute and uncontrolled discretion of the said Trustees for the time being) shall think best for effectually carrying the said trust into execution."

† Report of Popular Education Commission, iv., 306.

‡ Hansard, ccxv., 1927.

entrusted to official hands, the Founder's desire will probably be accomplished, and obsolescence be prevented. But it may be doubted whether purely private powers of Revision will produce much effect; for administrators are seldom willing to accept, much less to initiate, innovations upon their accustomed modes of working. No instance is on record of any small corporate body desiring to reform itself. The older cathedrals, unlike those founded after the dissolution of the Monasteries, possess the power of altering and amending their statutes by the Visitor's consent. But the Archbishop of Canterbury lately stated that he could not find that on any occasion had any one of them ever made any proposal for any such amendment; though, in his opinion, "great changes are necessary, and many evils have to be met," * and, as the Bishop of Carlisle points out, the statutes are in many cases so antiquated that the Chapters "swear to observe rules which they know they cannot keep." †

Another remarkable instance of the repugnance of administrators to any Revision of the Foundations they administer, has been afforded recently by the City parishes. The Educational Endowments Committee of the London School Board ‡ addressed to all these parishes a letter inquiring as to their willingness to consent, under section 30 of the Endowed Schools Act,§ to the application of their more obsolete Charities to educational purposes. Of the 106 parishes, only 35 sent any reply to the letter, and of these only one (St. Botolph's, Bishopsgate) professed any willingness to consent to a Revision. Even when the Royal Commission of last year called upon these parishes to give evidence about the condition of their Charities, though the evidence was honestly given, "a protest was recorded against the inquiry in more than one instance."

If we have now established the wisdom of creating a power of revision, and have determined the nature of the

* House of Lords, May 16th, 1879.
† Ibid. ‡ *Supra*, p. 171. § *Supra*, p. 198.

body into whose hands that power should be entrusted, it only remains to indicate the direction in which the power can most profitably be exercised. We have already laid down the rule* that no endowment should be divested from that general province of charity—educational, medical, religious, or whatever else it may be—to which the Founder devoted it. But beyond the slight assistance which this rule affords, the Revising authority must depend upon general economical principles for guidance, in selecting the new purposes to which to apply endowments that can no longer be devoted to their original objects. The field of choice seems at first sight a wide one. The sphere of charity embraces "all that can enlarge the boundaries of human knowledge or contract the range of human sorrow."† But it is not difficult to indicate in general terms some gradations of merit amongst charities; whether we regard the relative magnitude of the evils against which they are directed, the relative degrees of efficacy with which they meet those evils, or the relative chances of their action being itself productive of new evils. It is easy to see that in regard to the magnitude of the evils they respectively seek to remedy, the Royal Humane Society must rank above the Royal Geographical;‡ that in regard to efficiency, a school with moderate fees is better than a school which charges none;§

* *Supra*, p. 223.

† The words are those of Daniel Whittle Harvey, Brougham's zealous ally in the war against Charity abuses.

‡ Which has been judicially held to be a "charity."

§ The Scotch Education Commissioners say, "The practice of providing instruction gratuitously is very questionable. It has doubtless tended to lower the estimate which the parents form of the value of education. What they do not pay for, they do not value so highly as if they had to make some effort to obtain it; and though the prevalence of poverty may excuse, it does not remove, the evils which flow from this source. Children are taken from school on the most trivial grounds, and in many cases parents seem to regard the attendance of their children at a school rather as a favour to the teacher than as a boon to themselves. If the parents had to pay a school-fee in advance, however small, they would take greater care to secure regular attendance on the part of their children for the sake of getting value for their money. The system of gratuitous assistance, in education as in other things, tends also to destroy their self-reliance—that quality of character of which they stand so much in need." (Parl. Papers, 1867, xxv., lxxii.)

that in freedom from bad results, an allotment garden which makes a man industrious is a more unmixed benefit than a dole of bread which makes him idle. Or we may take other examples. The grammar-schools which made the peasant lads of the Lake district a higher race than those of England at large,* produced results less mixed with evil than those innumerable foundations which, by relieving the poor of Bruges from all necessity for exertion, have reduced the city, that in the sixteenth century was the commercial capital of Northern Europe, to one-fourth of the population that it then possessed. The efficacy of a Reformatory in preventing crime is less than that of a primary school which trains the young to habits of industry before they have acquired those of vice. And in the remaining point—that of magnitude of evil—a charity which relieves those who have fallen from comfort to poverty, assuages a keener wretchedness than one which relieves those who have been poor all their lives long. The clergyman's widow, the half-pay officer, the bankrupt tradesman—in a word, *les pauvres honteux* who will not beg—are the poor who suffer most. It must not be forgotten that at the present day the lower middle class, the class which is reached by the income tax as well as by direct taxation, is really the poorest. Yet its family pride and its class-spirit are a power which the nation can ill afford to lose, as it does whenever such households succumb in their struggle and fall into a lower rank of life.

It may be easy in cases so obvious as these, to determine the relative merit of two Charities in respect of one of the three great points of comparison—evil, efficacy, purity of result. But cases will often arise involving such recondite considerations as to render the determination highly difficult. Moreover, for purposes of practice it will not be sufficient to take into account one only of the points of comparison; all three must be considered, for only by the combination of the three appraisements can the practical value of the charity be determined.

* Life of Wordsworth, I. 301.

Such a complex calculation can seldom be an easy task; and the progress of sociology must from time to time reveal errors in the estimates most skilfully reckoned. Increasing experience has often led men to find out that some form of charity once thought good is really bad, as in the case of doles; or, on the other hand, that some form which was once thought bad is really good, as in the case of gifts for aiding emigration. Thus Lord Bacon gave it as his opinion that grammar-schools were "too many, and there would be no providence to add where there is excess. . . . By means of the great number of schools, they find want in the country and towns both of servants for husbandry and apprentices for trade."* But the policy of recent legislation has set in the direction of transferring endowments from the purposes of primary to those of secondary education.

Yet there are a few general rules which may be employed with safety, so far as they will go, in the task of classifying the relative merits of our charities.

Thus, (I.) there is the obvious rule that, of two ways of palliating an evil, we must choose the more powerful. And beyond this, (II.) relief which removes the causes of the evil is better than that which palliates or increases it. The poverty of the labouring classes is better remedied by instruction which raises the value of their labour, than by marriage-portions which multiply their numbers and thereby lessen their wages. To sell food to them at an underprice is, in the same way, a less potent charity than to teach them what are the cheapest foods, and the cheapest modes of cooking. Similarly Bishop Temple has suggested that the money now spent in doles would more effectually check poverty, if it were spent in increasing the interest given in the Post-office Savings' Bank to the inhabitants of the particular parish. For the divine paradox, "To him that hath shall be given," embodies a grave economical truth. To give to him that hath not, with any prospect of the gift being periodically repeated, is one of the surest ways of

* Advice to the King on Sutton's Charterhouse Foundation. (Spedding's *Letters and Life of Bacon*, iv. 252.)

making him slow in seeking work, and helpless in doing it. Such gifts may be multiplied, either by a Foundation or by a Poor-law, until they afford the idle man the means of continuing his idleness, and produce the state of things described by Dean Close, under which "the poor may be born for nothing, nursed for nothing, clothed for nothing, educated for nothing, apprenticed for nothing, and doctored all their lives long for nothing. They may begin as paupers and end as paupers, and out of public funds be provided with shroud, coffin, pall, and burial-ground." Their poverty is not diminished, but intensified; the Founder entails a curse where he dreamed of perpetuating a blessing. Hence the framers of the Poor-law of 1834, foreseeing that the official relief they provided would tend to deaden its recipients, did not aim at making it universal, but designedly left scope for that private personal charity which alone "can measure the bounty to the need, and temper the gift by time, place, and occasion." *

On the other hand, (III.) if we must choose amongst forms of relief that only assuage the evil without removing its cause, those—if of equal potency—are to be preferred which produce least new evil. Thus money given in pensions affords a more unmixed pleasure to the recipient than money spent in maintaining him in an almshouse. In the former case the benefit—to use a phrase of Lord Bacon's—will be more seen, but in the latter it will be more felt. This principle will even justify us in regarding an Orphanage as a less valuable form of charity than a fund for maintaining the same orphans in the households of their kinsfolk; (provided that the supervision of careful Trustees can be secured, since the child, unlike the adult pensioner, cannot shift his home whenever he finds himself ill-treated). The same principle will lead us to condemn such a gift as that of Mr. John Hardham, who left £10,000 to the town of Chichester to diminish its poor-rates; the rates were diminished, but the diminution only served to produce a corresponding increase in rentals.†

* Mr. Hare.

† *Gentleman's Magazine, LII.* 220.

Or if we are choosing, not between forms of remedy, but between evils to be remedied, we shall start with the obvious rule (IV.), that the graver the evil, the more desirable is the Charity that relieves it. But beyond this, it is, as we have seen, important that charity, diminishing, as each gift does, the productive capital of the donor, shall not also diminish the diligence of the donee. Hence (V.) an inevitable evil is more deserving of relief than an avoidable one; we must assist the aged poor in preference to the ablebodied. And (VI.) an unexpected evil is more deserving of relief than one that could be foreseen; we must assist the sick in preference to the aged.

The last two rules will lead us to rank among the best charities such as aim at the relief of congenital misfortunes, as by providing for those who are born blind, deaf, dumb, or idiotic—born, that is, to misfortunes which neither they nor their parents could avoid or even foresee. On the same footing we may place those Charities that are directed against evils which, though they can be foreseen and provided against, are yet of so general a character that no particular individual is under any obligation to make the provision. Where, indeed, such evils are of a physical character, the State now usually accepts the duty of providing against them; though in earlier stages of society lighthouses, bridges, and riverbanks were left—as, even at the present day, are lifeboats—to be the creatures of private bounty.* But where the evils are not physical but spiritual, even the modern State does but little to grapple with them. To raise or maintain the national taste, to stimulate intellectual research or to promulgate its results—these are aims which it must long be left to private benevolence adequately to accomplish. Galleries and museums, laboratories and libraries, professorships and prizes, afford an ample sphere for the wise liberality of Founders. It would ill become the writer of these pages to forget that it was into such a

* "Some of the largest bridges were chiefly built by alms collected for this as a religious purpose. Pont de Gard, over the Rhone, was one; the bridge over the Taro was another; Maidenhead bridge was also another."—*Sir F. Palgrave.*

channel that Mr. Edmund Yorke chose to direct his gift. Remembering how innumerable are the problems that still remain to be solved in the philosophy and history of Law, and how directly they bear on the happiness of mankind, we may well desire to see the Yorke Foundation, rising beyond its present meagre results, elicit in future years treatises which may rival in intellectual merit those that have been called forth by the prizes of the Institute of France, and may bear practical fruits not far inferior to those of that seminal essay for which the Members' Prize of 1785 was awarded to Thomas Clarkson.

We must give a lower rank to such Charities as deal with evils which the sufferer, though he could not avoid them, could foresee and provide against. A costermonger may be ruined by a three days' rain, or a gardener by a three weeks' frost; but it is their duty to lay by a provision for such casualties of their callings. In like manner every man should reckon upon sickness almost as certainly as upon hunger, in making his calculations of expenditure and fixing his standard of comfort. Hence medical charities, like educational ones, are open to the objection that they are too often employed in buying for a man what he should have bought for himself. It has recently been calculated that one-third of the population of Brighton obtain all their medical assistance gratuitously, from the local charities. Ready access to hospitals leads the poor not only to forget the sick ward of the workhouse, but to omit from their plans of life any provision for the event of illness. In the same way, educational charities are too often employed in paying for such a measure of education as the parent when he married ought to have counted on having to provide for every child. Apart from such abuses, both medical and educational charities rank high; for they are sure to confer great benefits, and they can do hardly any direct harm. Where, consequently, they are directed to contingencies that could not well be foreseen and provided for—as where the former provide surgical aid for accidental injuries, or the latter an exceptional training for persons of

exceptional aptitudes or exceptional infirmities—we may place them not in the second but in the highest rank of charities. In this manner educational endowments may still remain available for children of the class that fills elementary schools; though they cannot profitably be expended on the elementary part of those children's education, now that this part is provided for as a matter of State concern. The principle will justify us in giving almost equally high rank to such charities when they are employed against evils which the individual, though he foresees and could provide against them, has not yet learned to realise as evils. Thus an endowment for the cure of disease may be well applied in effecting those sanitary improvements of drains or dwellings which the cottager sees no reason for effecting for himself. Or an educational endowment may be well applied in securing to girls that higher instruction which their father sees no reason for giving to any but male children. It will, indeed, be important for all revising authorities to bear in mind the fact that most of the Charities they will readjust, such, for instance, as most of our doles and almshouses, were intended to benefit women as well as men; and therefore that the new uses to which they may be diverted should if possible be uses by which both sexes may profit. This caution will be the more needed so long as the secondary education of women remains in its present state—scanty in quantity, frivolous in quality, and exorbitant in price.

The fact that there are gradations of merit amongst Charities, has long been recognised by English law, which, as we have seen, divides them into three classes to be viewed with varying degrees of favour.* But it is only with respect to the facilities for their creation, that this order of merit takes effect; whereas the more appropriate place for recognising it is on the occasion of their Revision. A public body, like the Revising Tribunal, in the exercise of a public duty, is sure to pay full attention to all distinctions

* *Supra*, p. 35.

which have been laid down for its guidance. But there is by no means the same certainty that these distinctions will be present to the mind of a private individual when he makes some charitable gift—especially as the majority of such gifts are made by will,* and wills are often made without professional advice, and even when made with it, are often made hurriedly. Only this forgetfulness of legal distinctions can account for the singular fact that the privilege conferred by the Act of 1736 upon the Universities, in empowering them to take land by devise, has proved almost a dead letter. "There has been scarcely any landed property given to the University of Oxford since the statute of George II.," said the Vice Chancellor in 1851.† A case has been communicated to me on unimpeachable authority, in which a person who, having no near relations, was desirous to leave all his property to public uses, was advised by his solicitor that it would be impossible to do this with his lands; and they were accordingly devised to a distant kinsman. Had the testator been informed of the privilege of the Universities, he would undoubtedly have availed himself of it; for his will contained a considerable bequest for University purposes. Many such cases might probably be found. A knowledge of minute distinctions in a minor branch of law can hardly be expected in an ordinary layman, or in an ordinary lawyer; and if this be so, the most suitable place for recognising the relative merits of different Charities—valuable as the principle of such discrimination undoubtedly is—must be found elsewhere than in that portion of the law of charitable gifts which governs their Creation.

* *Supra*, p. 140. † Report of Mortmain Committee of 1851, p. 526.

PART VI.

SHOULD THE STATE SPECIALLY FAVOUR CHARITABLE ENDOWMENTS?

If we may now assume that the State should resolve to permit the endowment of charities and to place such endowments on the same footing as gifts to ascertained private individuals, there will next arise the question whether they are to be not only permitted, but favoured. Ought the State to encourage them, either by pecuniary aid from its own Treasury, or by investing them with special legal privileges?

Ought the State to confer upon them any pecuniary endowment from its own funds? That endowment may take many different shapes. It may be a direct subvention from the funds of the Exchequer to those of the charity; whether paid periodically, like the annual Parliamentary grants formerly made to the London Foundling Hospital,* and still made to some Dublin Hospitals, or given once for all, like the land grants which are made to the hospitals of Australia and New Zealand. Or again, it may be a periodical payment by the Exchequer, not to the charity itself, but to public servants, whose time is to be devoted to protecting the interests, assisting in the conduct, and lessening the law-expenses of the charity; like the present annual vote for the Board of Charity Commissioners. Or instead of a payment from the Exchequer, it may take the indirect form of an exemption from the ordinary contributions which the charity would otherwise have to make to the Exchequer; like the exemption from Chancery fees which used to be proposed by those who sought to prevent the institution of the Charity Commissioners, and like the exemption from income tax now enjoyed by English charities.

* In the sixteen years 1756—71, the Hospital received altogether £549,796 from Parliament, *on condition of admitting children indiscriminately!* See Knight's *London* (ed. 1877, iv. 345-7).

The importance of the *first*, a Subvention, is made familiar to us by the Education controversies of the past generation; and the State grants made in aid of the Scottish Universities. If we have been right in regarding it as a function of endowments to perform those public services whose importance is not yet so generally recognised that the State is justified in entirely defraying them by taxation, it will follow that the intermediate plan of a State subvention may be appropriately adopted in that intermediate and transitional period when the importance of the proposed service has been admitted by a majority of the tax-paying public, but by a majority so small that only a tentative and partial adoption of the plan would be justifiable. There was a time when bridges and lighthouses were thus regarded; and the period which separates Lord Brougham's Educational building-grant of 1833 from the Education Act of 1870 marks a transition of this kind. It is, again, a function of Endowments to perform services whose importance the State regards as sufficiently great to justify their being undertaken by the nation, but whose character is such that their value would be impaired by their passing into the hands of a bureaucracy. Here again the State may with advantage aid in the labour which it does not dare to monopolise. It may be better to augment the funds which are administered by local and independent managers than to create a fund which State officials would administer less successfully. The Foundling Hospital of London, with all the faults of its original form, was at least preferable to those of Paris and Vienna. It may be better to augment the salary of an endowed and independent servant than to render him the mere hireling of the State. The professorial chairs of Scotland have not become the mouthpieces of Cæsarism like those of Germany. The Regium Donum of Ulster did not impair the fidelity of the pulpit as the State wages of Lutheranism have done. In modern times Ireland, with its less mature civilisation, has naturally afforded more instances of these subsidised charities than England. By 5 Geo. III., c. 20, and a series of subsequent Acts, thirty-one

infirmaries were created in Ireland, to be supported by the combination of Parliamentary supplies, local taxation, and local subscription. By 45 Geo. III., c. 91, the Irish grand juries were empowered to subsidise Dispensaries out of the county rates to the extent of a sum equal to the private subscriptions to them. And by 58 Geo. III., c. 47, the grand juries were empowered to subsidise Fever Hospitals to the extent of double the amount of the private subscriptions; whilst Government loans were made for building them. The theory of such subsidies was well stated by a Parliamentary Committee which reported that "the principles on which alone any fair claim to public assistance can be made on the part of Hospitals are—the proved utility of the charity, the improbability of its maintenance by private aid only, the contribution of funds raised locally, by subscription or taxation, and the strictest economy in salaries and all other expenses."*

The *second* form of aid, Paid Management, is unjustifiable on principle, though excusable where, as in England, it is found to be the necessary condition of initiating any effective supervision of the conduct of endowments. That charities themselves should pay for any trouble that they give, is a principle as simple as it is sound. This principle was assumed in all the earlier efforts to create a permanent Charity Commission. Lord Lyndhurst, when introducing, in 1844, the first Government Bill for this purpose, hesitated whether to throw the expenses of the Commission upon the Consolidated Fund, or upon the charities themselves by levying a percentage on their incomes (as was done in the case of Lunacy visitors). He ultimately proposed to combine the two plans; taking an impost of threepence in the pound on the net revenue of those charities which had not more than a hundred a year, and applying the "Charity Administration Fund" thus raised, to defray the Commissioners' expenses so far as it would go; but throwing upon the Consolidated Fund any balance that might still remain to be met. Such a plan it was, of course, for the House of

* Parl. Papers, 1829, iv., 139.

Commons alone to pronounce upon. It was lost in consequence of the opposition of Lord John Russell, who protested against taking threepence out of every sovereign of the income of well-conducted charities, for the purpose of superintending the ill-conducted ones. The reply is, nevertheless, obvious, that the beneficiaries of even a well-conducted charity have more concern in the existence of the Charity Commission than has the ordinary taxpayer. The promoters of the Bill still adhered to their financial principle of a "salvage-duty," to use Lord Brougham's phrase. The Bill of 1845 proposed a tax of sixpence in the pound on charities which had only £50 a year; the Bill of 1846 a tax of threepence in the pound on those which had not more than £100 a year, and of threehalfpence in the pound on those which had. Lord Truro's Bill of 1851, drafted by the Royal Commission, proposed a tax of twopence in the pound on all charities with an income of £10 and upwards. All these Bills failed. The next, Lord Cranworth's Bill of 1853, threw the expenses of the Commission upon the public exchequer, and abandoned the tax, on the ground, real or nominal, that many of the charities had incomes so small that the tax would not be worth collecting; probably also from a fear that if the tax were persisted in, the Bill might go the way of its predecessors. Hence no attempt was made even to charge fees for assistance actually rendered by the Commission to individual charities, great as the saving effected to the charity by that assistance would often be.

But Lord Lyndhurst and Lord Cranworth had estimated the cost of the Commission at only £5000 or £6000 a year.* Time very soon showed that both its cost and its value greatly exceeded all the estimates that had been made. This discovery naturally revived the idea that its expenses should be met or at least shared by the charities for which they were incurred. It was pointed out that the Board cost the Consolidated Fund £21,800 a year; that its official Trustees and their staff were gratuitously managing some millions of Charity property; that it made several

* Hansard, cxxvi., 1018.

hundred Orders annually (2495 in 1878); and that fees might fairly be imposed upon them, since each Order was a benefit, or a penalty, rendered necessary by the circumstances of the individual charity which it affected, and protecting it from the far greater expenses of the ordinary tribunals. In spite of the reply that no fees were charged by analogous Boards, like the Drainage, the Poor Law, and the Ecclesiastical Commissioners, this policy prevailed in argument. In 1868 the Commons voted, though only by a majority of one, Mr. Goldney's motion—"That in the opinion of this House the expenses of the Copyhold, Inclosure, and Tithe Commissions, the Inclosure and Drainage Acts, and the Charity Commissions, ought not to be borne by the public." And in 1869 an Act was passed* authorising the making of a scale of fees for all work done for charities under the enabling powers of the Commissioners. But no such scale has ever been established (though one was drafted by the Board in 1870), and the Act has remained a dead letter; in consequence of a strong feeling on the part of the Commissioners that any scale they could make would bear too heavily upon the poorer charities. In 1878 the Board reported to the Treasury that the utmost amount they could raise annually by fees would be only £7000, which would not cover a third of their expenses; but that a tax of threepence in the pound upon the income of charities would cover the whole of their expenses, and might readily be raised by a stamp upon those accounts of revenue which charities are bound to render to the Board. It is, however, to be feared that such a mode of raising it would have serious drawbacks. It is essential that this tax, if imposed, should be so arranged as not to deter any charity from placing itself under the control of the Commission; it must be made as general and as little conditional as possible. Now, these returns of revenue have never been regularly rendered to the Commissioners or stringently enforced by them (probably because they have no means of enforcing them except by proceedings in Chancery); in their report

* 32 & 33 Vic., c. 110, s. 16.

for 1877 it is estimated that 37,000 returns ought to be sent in annually, but the actual number has never yet exceeded 24,154, the number reached in 1879.* Of course any stamp duty upon returns would reduce their number considerably. It is practically important also to notice that the representatives of the principal charities recently intimated to the Chancellor of the Exchequer—when waiting on him to protest against any general taxation of their incomes—their perfect willingness to pay fees for the work done for them by the Board.†

In 1879 Lord Beaconsfield's Government adopted the proposal which, as we have seen, the Board had made to the Treasury in 1878, and embodied it in their Charity Expenses and Accounts (No. 2) Bill, 1879. This Bill provided for the payment of the expenses of the Commission by a duty of twopence-halfpenny in the pound on the gross incomes of charities, which was estimated to be equivalent to a duty of threepence on their net incomes, and to be likely to produce £26,000 a year. It was to be paid by stamps imposed upon the annual accounts sent in by charities. The charities at once protested. A deputation of their representatives waited upon the Chancellor of the Exchequer and unanimously denounced the measure as a Bill for the repression of benevolence; whilst many of them naively expressed their desire to see the Charity Commission abolished altogether. Guy's Hospital complained that its quota of the tax would be no less than £500 a year.

The *third* form of aid, an Exemption, is now by far the most important in England. To the financier who wishes to be or to appear benevolent it affords what seems, at any rate superficially, to be the simplest, cheapest, and least invidious manner of conferring a favour upon charities. Hence this exemption has taken deep root in the English system of direct taxation, both Imperial and local; and has secured a powerful hold upon popular sympathy. It dates from the earliest history of the poor rate and the earliest history of the income tax.

* *Supra*, p. 142. † *Times*, July 16th, 1879.

Till 1831 the charitable and religious institutions of Ireland enjoyed an exemption from paying postage on their letters; and regarded it as an important assistance in getting in their revenues, since many a patron who did not grudge his subscription, grudged the cost of remitting it by post.* In Ireland all charitable bequests were exempted from the legacy duty (56 Geo. III. c. 56; 5 and 6 Vic. c. 82, s. 38) until Mr. Gladstone carried in 1863 a proposal to make them pay their ten per cent. as in England. Occasionally that exemption was conferred even in England, as the privilege either of favoured institutions, like the Bedfordshire Hospital (42 Geo. III. c. 99 s. 4), or of favoured legacies, like bequests of literary or artistic objects for preservation in corporate institutions (55 Geo. III. c. 184). But all attempts to make these exemptions general have failed. In 1812 Sir John Newport proposed to relieve all charitable bequests from legacy duty; but was defeated by Mr. Perceval on the plea that the Legislature should not aid people who might be giving to charities that portion of their property to which their relatives were reasonably entitled. In 1848 Mr. Raphael obtained leave to bring in a Bill for a similar exemption. He declared that his main object in coming into Parliament had been to introduce this measure, and that if it passed into a law he should at once take the Chiltern Hundreds. He estimated the annual amount received as legacy duty on charitable bequests at £15,000; and the Chancellor of the Exchequer pronounced this to be a low estimate. Sir Robert Peel opposed it, from a general dislike to any legislation that would encourage parties to neglect the claims of their families in favour of public charities. He had known public institutions created by will, and the descendants of those who created them receiving £100 a year from the royal bounty, because their parents gratified their vanity by presenting to the public what should have constituted the sources of their subsistence. He had seen the descendants of such a Founder come to the public treasury, saying that they hoped the

* Hansard, v. 84.

royal bounty would be exercised in their favour, as they had been ruined by the misplaced generosity of their own relatives. From an account which Lord Hatherley gives* of the incident to which Sir Robert was referring, it appears to have been the case of an applicant whose grandfather had left £400,000 to a hospital which he had founded.

An answer, perhaps more relevant than those of Perceval and Peel, has been given to this proposal by Mr. Gladstone, who contends that such an exemption would be superfluous, because the testator always takes the duty into account, and bequeaths nominally a larger amount than he actually intends the charity to receive. If so, the tax is really a tax on residuary estates; and only falls upon charities in those very rare cases in which the residue itself is bequeathed to charity.

But all the existing fiscal exemptions, and especially that which concerns the income tax (5 and 6 Vic. c. 25, ss. 61 and 88), have been challenged by a puissant foe. Few more striking contributions to the literature of Endowments have ever been made than Mr. Gladstone's great speech of May 4th, 1863, on the Taxation of Charities.† It was delivered in support of the Government proposal to subject to the income tax all charity property except the buildings actually used for occupation by the charities, and any funds which had been left to keep in repair buildings used for divine worship.

His argument was of an elaborate character; but I venture to recast it in a summary form. He contended that (I.) it is against public policy to encourage charities at all by any positive pecuniary preference; for all property should contribute equally to the State which protects all equally, and any exemption of the poor who are supported by charity is unjust to the poor who labour. The property of charities is enhanced in value by the results of public taxation, and the commodities they consume have been relieved from duty by fiscal reforms which have enhanced

* *Transactions of Social Science Association*, 1859, p. 69.

† Gladstone's *Financial Statements*, p. 426.

the direct taxation of the property held by other citizens. (II.) But of all charities the *endowed* ones least merit such preference; for they very generally create a patronage which is practically private property, and they often spring from mere vanity, and seldom from self-sacrifice. The great majority of them were created, not during the creator's life, but by his Will; and it seems undesirable to spend public money in tempting men to try to immortalise themselves as pious founders. The only true 'charities' are those which a man gives out of money that he might have spent upon himself, or, in other words, gives during his life-time; but these are not exempted, for the Income-tax Commissioners give a man no abatement for his benevolent contributions. These pay the tax before leaving the donor's pocket. "I lay great stress upon this great anomaly, that no proof of moneys expended in charity by the living is admitted as a ground of exemption from income-tax, whilst proof of moneys so expended under the disposition made in a will by the dead is received as a ground of exemption." Moreover the endowed charities are rich, and are irresponsible; whilst the unendowed charities have the drawback of being poor, and the merit of being supervised by the whole body of subscribers. The present exemption subsidises Bartholomew's, Guy's, and St. Thomas's Hospitals, whilst it leaves Charing Cross, King's College, and University College Hospitals to shift for themselves. (III.) Even if some premium from the national funds to the endowed charities might once have been necessary, it is now sufficiently supplied by the money which the State has recently come to expend upon charities, in supporting Primary and University Education, in maintaining a Poor-law Board, in instituting costly inquiries into the resources and management of these very charities, and in maintaining a permanent Commission to superintend their administration, and save their lawyers' bills. (IV.) Moreover, the present rule is undesirable, on account of its indiscriminate character. Its blind exemption helps not merely those few charities (not one-tenth of the whole) which all admit to be well planned

and well worked, but also a far more numerous and far more wealthy group, of which some are purely local (and why should a parish which has no charities be taxed to help the parish which has?), others are of doubtful utility, others certainly useless, and others again (the doles, which possess great wealth*) are distinctly mischievous, and have been condemned in three generations by three successive Commissions — Lord Brougham's, the Poor Law Commission, and the Popular Education Commission, as doing more harm than good. (V.) Again, the very form which the subvention takes—that of an *Exemption*—is open to peculiar objection. It does not really possess its apparent advantages of simplicity and cheapness; for not only is the very definition of 'charitable' purposes a matter of great legal obscurity, but "the Revenue Department is put to serious expense from the excessive complexity and minuteness of the claims for exemption." And it has a positive disadvantage in its unostentatious character. If an express subvention were voted to the charities, it would appear upon the estimates, it would be obvious to every Member of Parliament, and like every other vote, would be open to ready challenge and subject to constant control. But when the same amount of assistance is furnished in the shape of an Exemption, it is withdrawn from view and lies shrouded within the folds of the most complicated sections of the statute book. It is a public grant which, unlike any other public grant, is never investigated and never weighed. "We plume ourselves upon our liberality, we leave this great expenditure entirely in the dark; we waive in favour of these institutions not only the receipt of a certain sum of money, but the application of all those principles of philosophical and practical administration, and of constitutional control, which we consider necessary for the general government of the country and the management of our finances."† But Mr. Gladstone's proposal, though thus elaborately supported, was defeated by a strenuous public feeling which made itself felt both inside and outside Parliament. Never-

* *Supra*, p. 138. † Page 436.

theless, in 1871 the House of Commons resolved "That discontinuing the exemption of endowed Charities from the Income Tax is a suitable method of carrying out the decision of this House* against the payment of the expenses of the Charity Commissioners out of public funds."†

Those important heads of taxation, "the death duties," charity property escapes by its very nature. Belonging as it does to a deathless owner, it becomes free from all *future* hazard of probate, legacy, or succession duty. This fact was recognised on the original creation of the succession duty in 1853; and the House of Commons apparently received with approval the proposal that some corresponding burden should ultimately be laid upon corporation and charity property, though in the form of a regular annual charge, since no actual *deaths* ever take place upon which it could be claimed as a literal succession duty.

In 1843 scientific and literary institutions were exempted by statute from poor rates, in accordance with the exemption which Charities had always enjoyed in practice. But in 1865 the startling decision in the Mersey Docks case established that Charities had no legal title to this exemption.‡ This unexpected liability produced serious results. In one hospital the beds were seized for poor rates.§ St. Thomas's Hospital, whose palatial buildings are situate in a poor parish, had to contribute £3000 a year to the rates of Lambeth; and reduced the number of its in-patients by sixty in order to meet this expenditure.

This decision still remains law. But in 1869 Parliament (in the House of Commons by a majority of 120) exempted Sunday and Ragged Schools from rates.‖ And in 1871 Mr. Muntz attempted to carry a permissive measure which would give vestries and overseers a discretion to exempt charities from the rates; in hopes that they would relieve the poor charities but rate the overgrown ones. Parliament, however, declined to provoke a controversy in every parish

* *Supra*, p. 248. † Hansard ccv., 1514.

‡ See also 30 L. J. R., M. C. 131, and Castle *On Rating*.

§ Hansard cciv., 274. ‖ 32 and 33 Vic., c. 40.

about the merits of every charity it contained, and to embarrass the wisdom of the vestries with subtle questions as to the merits of doles, nunneries, homœopathic hospitals, or licensed victuallers' almshouses, institutions to which many of the ratepayers might dislike to become involuntary contributors. It was pleaded that some charities, like infirmaries and dispensaries, saved the poor rates. It was replied that other charities, like doles, augmented them.

None of the statutes which have exempted charities from taxation have ventured to give any definition of charity; and the executive has therefore usually been content to adopt the time-honoured definition embodied in 43 Eliz. c. 4.* But in one remarkable instance, which occurred in 1856, the law officers of the Crown refused to allow an exemption from property tax to an estate at Richmond, though it was settled for uses which clearly fell within Elizabeth's definition of charity. The rents were to go in aid of the poor rates and other public burdens; and thus were simply a contribution in relief of the houses of the wealthier proprietors of the parish. The Crown justly declined to burden the other income-tax payers of the country for the purpose of adding a national subsidy in aid of this unreasonable relief.

There is a curious story about the grammar school and almshouses at Newport, in Shropshire. They were founded by Sir Thomas Adams; whose great munificence led Charles II. to send for him, and ask "whether he had not greatly injured his fortune; to which he answered that it rather increased it, and if his Majesty would procure him an Act of Parliament to exempt his estate from taxes, he would give him £1000. We are not informed whether the King accepted the offer; but the Act passed."† I find upon

* "The relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in Universities; repair of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preferment of orphans; maintenance of houses of correction; marriages of poor maids; aid of young tradesmen, handicraftsmen, and persons decayed; redemption of prisoners or captives; aid of poor inhabitants in payment of fifteens, setting out of soldiers, and other taxes."

† Cooke's *Topographical Description of Salop*, p. 30.

local inquiry, that the estates left by Sir Thomas for the support of his charitable foundations are still exempted from taxes.

Apart, however, from any form of pecuniary assistance, the State may also confer very material favour upon Charities by releasing them from any rules of law that bear oppressively upon its citizens. The legal privileges which it thus confers upon Charities may refer either to the original constitution of the Foundations, or to the acquisition, the protection, or the administration of their property; not to mention the special advantages which they derive from the extraordinary means of Supervision which, as we have already seen,* the State will probably provide for their benefit.

As regards the constitution of Charities, facilities may be afforded for their incorporation as Fictitious Persons. A remarkable instance of this may be found in English jurisprudence as early as the sixteenth century. By 39 Eliz., c. 5 (made perpetual by 21 James I., c. 1), any person who established a "hospital, *maison de Dieu*, abiding place, or house of correction" for the poor, with a landed estate of not less than £10 a year, was enabled to exercise at his discretion the kingly prerogative of incorporation; so that by his merely enrolling his Foundation deed in Chancery, the hospital, without the need of any royal charter, became a body politic, with common seal, and "perpetual succession for ever, in fact, deed, and name." A hospital thus incorporated may hold lands up to £200 a year without any licence in mortmain. This remarkable statute, though little known, is still in force; and, if the further conditions of Geo. II.'s Act were complied with, a corporation might at this day be created under it.†

We have already dealt with the power which the Act of 1872 has conferred upon the Charity Commission, to incorporate the trustees of any charity who may apply to them

* *Supra*, pp. 133-4.

† See Shelford on Mortmain, I. iv. i.; Tudor's *Law of Charitable Trusts*, p. 115.

for the purpose.* Recent reforms, however, of English law have, as we have seen, † destroyed the value of these facilities, by clothing unincorporated Charity trustees with all the advantages which could have been derived from an incorporation.

Again, the constitution of Charities may be aided by supplying any defects in the expression of the founder's wishes, where the vagueness of his language has left the Charity practically unestablished. Had he said that he meant to give his property to some friend, but never proceeded to name the friend, the State would leave his inchoate wish unfulfilled. But if he says that he means to give his property to charity, yet never proceeds to name the charity, the State may name it for him. In the one case the gift is declared void for uncertainty; in the other the State may favour it, and take means to render it certain. Thus in England, the Chancery Division, or the Crown by sign manual, will make a scheme to carry it into effect, instead of recognising a resulting trust in favour of the donor's representatives.‡ A charitable trust, unlike every other trust, need not have a definitive object.

Moreover, where a Charitable gift has been effectually created upon paper, but no steps have been taken by its administrators to commence its actual working, the State has a further opportunity for showing special favour. These administrators, being possessed of a trust fund, fall under the common obligations of trustees; but, from the nature of the case, there is as yet no one who has any definite interest in the fund, and any consequent claim to enforce those obligations. The hazard of their never being fulfilled is great. It becomes almost a certainty if the Charity is only to be established at a future time, or only upon a contingent event; like George Cunningham's charitable bequest, "in the event of my nephew not returning from India;" or Mrs. Kempston's, in the event of her niece and legatee marrying a prohibited person.§

* *Supra*, p. 114. † *Supra*, p. 117.

‡ See Lord Eldon's criticism in *Att. Gen.* v. *Mayor of Tristol* (2 J. and W. 318.)

§ Parl. Papers, 1829, iv., 127.

The hazard of such gifts being lost eminently calls for the special intervention of the State. In England, where the general superintendence of all charities is considered to be entrusted to the King as *parens patriæ*, his officer the Attorney-General has long been empowered to file "Informations" in Chancery to have such inchoate Charities carried into effect. The power, unhappily, was robbed of nearly all its efficacy by the rule of the Court of Chancery * that the Attorney-General ought not, except in the simplest cases, to allow himself to proceed in an information respecting a Charity until he found some private person willing to act as "relator," and to become responsible for costs, in the face of the fact that, as Mr. Shelford says, "The costs of an Information are in general extremely high."

Still more effective are the similar powers which have been conferred upon the Irish Commissioners of Charitable Donations and Bequests. They may sue summarily for charitable gifts of small amount.† "A large sum of money, in the aggregate, has thus been recovered, and even by merely using the precaution of informing those persons who may hold money given to charitable purposes, several thousands of pounds have been paid to the Commissioners without the necessity of instituting any legal action."‡ Hence small bequests, which used to be those most frequently lost, are now those most punctually paid.§ Executors formerly counted upon withholding them with impunity, from the very smallness of the amount as compared with the costliness of the then only remedy—a Chancery suit.

By consent of the Attorney-General they may sue for charitable gifts of however great an amount, "and apply the same, when recovered, to charitable or pious uses, according to the intentions of the donor."‖ They may

* *Shelford on Mortmain* iv. 5. vi., vii. See *Att.-Gen.* v. *Boucherett* (25 Beavan 120).

† 34 and 35 Vic. c. 102, ss. 8 and 9.

‡ Hamilton's *Law of Charities in Ireland*, p. 132.

§ Parl. Papers, 1875, xx., 33.

‖ 7 and 8 Vic. c. 97, s. 12.

apply to have charity funds which are lying "in court" unused transferred to them.* They may apply to Chancery for a scheme for carrying out any Charity which cannot be constituted as the Founder directed it to be; or, if the Charity is not worth more than £300, or £30 a year, they may make such a scheme themselves.†

The Court of Chancery always favoured Charities by consenting to retain the trust fund in Court for any length of time that might intervene before the donor's trusts could be carried out, if there was any hope of their ultimately becoming capable of execution. Thus the £1000 which Archbishop Tenison left in 1715 for the prospective bishoprics of America remained in Court till 1826.‡ The principle might advantageously be extended to those deferred Charities which are preceded by a beneficial life interest, by requiring the life-tenant to report annually to the Charity Commissioners the condition and mode of investment of the trust property, and by taking measures for securing an early notification to them of his death. This suggestion is made by Mr. Gernon, one of the Secretaries to the Irish Commissioners, who states that these deferred Charities "are of frequent occurrence, and in many of them the property is irretrievably lost to Charity,"§ either because the life-tenant makes away with it, or because he lives so long that the gift over to Charity becomes forgotten. He also proposes that, even in the case of bequests to Charity which are to take immediate effect, it should be made the duty of the executor to report to the Commissioners at the end of his year of administration whether he has paid the bequest, and if he has not paid it to produce his accounts.

With respect to the acquisition of property, the State may confer peculiar legal privileges upon Charities; besides the

* 34 and 35 Vic. c. 102, s. 13. In 1853 there was a fund lying in Court about which a suit had commenced before 1776; but no one had pressed it to the point of getting a decree for a scheme for its application. See Q. 13,295 of Schools Inquiry Commission.

† Ss. 6 and 7.

‡ See 2 Russ. 142; and for Abp. Secker's similar gift, see 2 M. & K. 579.

§ Transactions of Social Science Association, 1861, p. 155.

privilege involved in exempting them from the common prohibition of Perpetuities. Thus it may establish for their use forms of conveyance of exceptional simplicity, like that provided by Peto's Act for Dissenting schools and chapels, and subsequently made available for Literary and Scientific Institutions.* Or it may in their favour overlook in an ordinary conveyance defects of form which would be fatal if the gift were made to any other donee. Thus in England an appointment may be held good in equity, in spite of its not complying with the formalities required by the Power, if it is made in favour of a charity.† Similarly a feesimple may be granted to a charity without words of inheritance. So under the older law a limitation of a remainder without a particular estate to support it, a devise of copyholds without a surrender, or a devise to a corporation, would have been good only if made to a charity.‡ These privileges, which surprised Lord Eldon and Mr. Justice Story,§ may be traced historically to the favour shown to charities by the Legislature in passing 43 Eliz. c. 4, which the Courts regarded as a suggestion of the general policy they should pursue in dealing with charities, just as the opposite policy of 1736 was afterwards adopted by them with similar complaisance.‖ Hence they concluded that if there was a gift in fact by a person who had a legal capacity to give in any way, the intention, improperly executed, was a sufficient foundation for supplying any imperfection in the mode of donation; and that the Legislature intended, that if estates were given in fact, defects in form were to be overlooked, and the charity to take place.¶

Similar illustrations of the peculiar efficacy of gifts to charity may be found in the ancient rule that a man could not recover goods stolen from him if the thief had since

* 13 and 14 Vic. c. 28 † *Piggot* v. *Penrice* (2 Eq. Abr. 191, pl. 6).

‡ Shelford on Mortmain, V. I. ii., iii.; Tudor, p. 37.

§ Story's Equity, s. 1174.

‖ *Supra*, p. 69. "It has been fashionable of late years," said the Lord Chancellor, in 1767, "to run down the construction which judges have put upon 43 Eliz." (*Case of Downing College;* British Museum Additional MSS. 5820, p. 114.) ¶ 1 Eden, 14.

given them to an image*; and the modern decision that a gift of lands to a charity cannot be defeated, like other voluntary conveyances, by a subsequent sale to a purchaser for valuable consideration.†

The same principle may also be applied by supplying defects not in the instrument of conveyance, but in the capacity or interest of the conveyor; as when a tenant in tail was permitted in equity to devise by will to a charity, and defeat the reversion;‡ or when statutory power was given to charities to purchase building sites from owners who are under disability.§

It may also be applied by affording bequests to charities a priority in the administration of the estate of the testator; thus practically subsidising the charity, not indeed out of the funds of the State, but out of other private funds. Such was the case in England so long as charitable legacies were payable out of equitable assets before all other legacies, and even before debts.‖

A further provision has been made in Ireland which will often enable charities to obtain funds which otherwise might, through long delay, have been altogether lost to them. Where a payment is to be made for charitable purposes, and no trustee or other administrator can be found who has power to give a receipt for it, the Commissioners are authorised to give an effectual receipt.¶ In the absence of such a provision the debtor or donor must either indefinitely postpone his payment, or go to considerable trouble and expense to have a competent trustee appointed. A case is on record, in which lands had been settled to provide a charity for four clergymen's widows, at Knawston, in Leicestershire. The trustees died off; no new ones were appointed. The widows died off; no new ones could be

* Y. B. 34 Hen. VI., c. 10.

† *Att. Gen.* v. *Newcastle* (5 Beav. 307). But see Lord St. Leonards, V. and P., p. 417.

‡ *Att. Gen.* v. *Rye* (2 Vern. 453, 755.) The Act of Geo. II. would now prevent such a permission.

§ 16 and 17 Vic., c. 137, s. 27 (England); 30 and 31 Vic., c. 54, s. 18 (Ireland).

‖ Tudor, p. 38.

¶ 34 and 35 Vic., c. 102, s. 12.

elected. The almshouse fell into ruins. The rent of the lands remained unpaid for so many years, that at last the tenant found that the only course for him was to file a Bill in Chancery against himself to know to whom he was to pay the arrears. Archdeacon Burnaby in a Charge of 1787 describes this as the then existing state of the charity, and adds that, "at Ashby Folville, a hospital endowed with considerable estates, appears to be in danger of being lost for want of Trustees; there being at this time none legally constituted. The rents are neither duly paid nor properly applied."* Fifty years afterwards Lord Brougham's Commissioners found the Ashby Hospital still without Trustees, no new ones having ever been appointed since its creation in 1673.

For the protection of the property of charities much may be done by the State. It is scarcely desirable that it should lay aside in their favour so useful a principle as that of Prescription, and enable them to recover their property from a wrongful possessor however old his possession and their neglect may be. Yet even this privilege was conceded to them by the English Court of Chancery until the Statute of 1832.† "Cases of charity," says Lord St. Leonards, "were not bound by that analogy which Equity applied to all other cases."‡ Whilst, conversely, in cases where charity trustees have mistakenly but innocently been in the habit of applying the charity funds in an unauthorised manner, Chancery sets a prescriptive limit to the remedy against them, and does not carry back the account so far as it would in the case of a similar error committed by an ordinary trustee.§ "To act," said Lord Eldon, "on any other principles would deter all prudent persons from becoming trustees of charities."‖ "To carry back the account to

* Burnaby's *Sermons and Charges*, London, 1805, p. 421. The whole history of these unfortunate Foundations may be seen in the Thirty-second Report of the Inquiry Commissioners (vol. v., pp. 457—460), and will repay perusal.

† 2 and 3 Wm. IV., c. 27.

‡ *Incorporated Law Society* v. *Richards* (1 Dr. and War., 258).

§ Whiteford on Charities, pp. 86-7

‖ *Att. Gen.* v. *Corporation of Exeter* (2 Russ., 54).

the commencement of the misapplication," said Sir John Leach,* "would prove the ruin of half the corporations in the kingdom;" a melancholy testimony to the extent to which ignorance of their trust affairs prevailed amongst the administrators of charities.

The State may also create a Registry of all charity property and of all the deeds that affect it. By such means it will perpetuate that knowledge of the boundaries of the one and the trusts of the other, which is peculiarly apt to become confused in the mere traditions of a fluctuating body of trustees, most of whom have probably never received any distinct information upon the subject, and none of whom have any personal interest in preserving their information. We have already seen† how important a step was taken in this direction by Sir Joseph Jekyll's Act of 1736; enrolment in Chancery being made compulsory in the case of all lands thenceforward to be given to charity by deeds *inter vivos*. A similar provision is to be desired for gifts of land by will (when legal), and for gifts of personalty. A general, but only optional, registration has indeed been established by the Charitable Trusts Act of 1855, under which "any deed, will, or document relating to any charity may be enrolled by the Board in books to be provided and kept by them for that purpose at their office, and a copy of any such deed, will, or document made from such books and certified under the hand of the secretary or one of the Commissioners, shall be received as evidence of the contents of the same deed, will, or document." ‡

Most States, indeed, provide a Registry for the landed property of all their subjects; and in that case, this protection is, of course, no peculiar privilege of charity lands. But there is a favour closely allied to this, which the State is scarcely likely to concede to its citizens at large, which nevertheless may with general advantage be conferred upon charities. It may undertake the custody of their title deeds, so as to put them beyond the chance of being lost.

* 2 M. and K. 37; cf. p. 157 *supra*.

† *Supra*, pp. 77 and 130.

‡ 18 and 19 Vic., c. 124, s. 42.

This step was taken in England by the Charitable Trusts Act of 1853,* which authorised "trustees or other persons having the custody of any deeds or muniments of or relating to *such*† charity, to deposit the same for security in a Repository which may be provided" by the Charity Commission. And by the Charitable Trusts Act, 1860, the Commissioners were empowered to require the production at their office of "any deed or document in which any charity or charities shall be solely interested," and, if they found that the person in whose custody it was had no legal right to the custody, they were empowered to place it in their Repository. The trustees of Irish Charities were similarly empowered in 1867‡ to deposit any deeds or other documents relating to their charity in a depository to be provided for that purpose by the Irish Commissioners; and a muniment room has accordingly been built at the Dublin office for the reception of such documents. The Inquiry Commissioners of 1818-37 enumerate many cases in which the title-deeds of Charities had been stolen, had been lost, had been burned, or had become illegible from damp. The rules of Tadcaster Hospital directed a chest to be kept to hold the documents; a memorandum of 1762 records that the chest was duly there, but it was unlocked, and all the documents were gone; and the Inquiry Commissioners of this century found the chest gone too.§ The Irish Endowed Schools Commissioners had to lament, "in many instances, the loss of documents illustrating the objects and the history of the Foundation, sometimes even the disappearance of its essential muniments, the charter, will, or deed by which the endowment was first instituted. . . . Great negligence has been shown in the care of the records relating to the several endowments. Charters and title-deeds have been in many cases lost, and schedules of them appear to have been but

* 16 and 17 Vic., c. 137, s. 54.

† This word may appear to refer to the charities described in s. 51, *i.e.*, those whose Funds have been transferred to the Official Trustees. But all the text writers seem to regard the 54th section as a perfectly general one; apparently treating the "such" as a clerical error.

‡ 30 and 31 Vic., c. 54, s. 11.

§ Tenth Report, p. 725. Cf. the narratives in i. 137, iv. 366, vii. 138, ix. 48.

seldom prepared. Serious losses appear to have been incurred by the Blue Coat Hospital in consequence of the neglect of their officers to preserve the leases and maps. Several other instances of the loss of school lands have been brought under our notice."*

In the administration of their affairs, Charities may obtain from the State many peculiar legal facilities. It may, as we have already seen, create an Official Trustee to be the technical holder of their property. Such in England are the "Official Trustees of Charitable Funds" and the "Official Trustee of Charitable Lands."† The former now hold stocks to the amount of nearly nine millions sterling, divided into nearly ten thousand separate accounts; and manage them at a cost of £2230 a year. In Ireland the Commissioners of Charitable Donations and Bequests were in 1844 rendered public trustees to whom any person might by deed or will give either real or personal property for the benefit of any diocese or parish of the Roman Catholic Church—thus conferring upon a single unestablished religion a privilege not enjoyed by even the (then) established one. Remarkable as this privilege is, it is still more remarkable how little it has been exercised. "Few grants have been made under this section, and I believe only *four* are in the present possession of the Commissioners."‡ In 1867 a general power was given to Irish charity trustees,§ to transfer to the Commissioners any Government stock or other securities, or rent charges, belonging to a charity, if the Commissioners consented; without the expense of a judge's order, which the first English Act required.‖ The Commissioners will then nominate local administrators, usually of course the trustees from whom they receive the funds, to carry out the trusts. So effective has this section been that the funds vested in the Commissioners under it exceed a quarter of a million. Such Official Trusteeships relieve the local administrators from responsibility, save the Charity pro-

* Parl. Papers, 1857-8, xxii., 261, 264. † *Supra*, p. 114.
‡ Hamilton's *Law of Charities in Ireland*, p. 60, ed. 1879.
§ 30 and 31 Vic., c. 54, s. 9; 34 and 35 Vic., c. 102, s. 11.
‖ *Infra*, p. 266.

perty from being lost by the death of Trustees or by other causes, and save the expense of conveyances on each future appointment of new administrators. The Official Trustees have no power to interfere in the administration of the income or in the management of any Charity, and their duty is confined to periodically receiving and remitting the income of the funds standing in their names to, or according to, the order of the Administering Trustees of the Charity for which the funds are held.

It is much to be desired that greater scope should be given to the system of Official Trustees. The transfer of real property to them still requires the order of a Court.* It is at least to be desired that this formality, which is necessarily attended with expense, should be removed, and the mere sanction of the Charity Commissioners be made sufficient; for every facility should be given to Trustees in applying for leave to take a step which can in no case injure the Charity, and may in many cases afford it great advantage. But it is still more to be wished that, by a general enactment, Parliament would remove the necessity for any such applications or sanctions, and would transfer to the Official Trustees what Mr. Senior calls "that fruitful source of lawyers' bills, the legal estate," in all the stocks and lands of all the charities in England, created and to be created. Such a precaution is peculiarly desirable in the case of stocks; nearly eighteen million pounds of which are now held by Charities. For besides the expense of powers of attorney to receive the dividends, unnecessary costs are at present incurred in giving official proof of the death of each Trustee as it takes place.

So far, again, as relates to the local trustees, much trouble and expense may be saved to Charities by facilities for making new appointments. We have already seen how complete a reform has been effected in this particular in England.† And the trustees themselves may be saved

* An Order of the Board suffices for personalty since 18 & 19 Vic., c. 12, s. 221; amending 16 & 17 Vic., c. 137, s. 51. In Ireland, an Order of the Board suffices for either.

† *Supra* p. 113. See the inferior power given to the Irish Board by 34 Vic. c. 102, s. 15.

much trouble in the conduct of their business by recognising its public character and permitting their powers to be exercised by a quorum of their number. By the Act of 1869, superseding that of 1860, actions may be brought by a simple majority of the trustees of a charity; and a majority of the trustees present at any duly constituted meeting may execute any disposition of the charity property.* It is moreover only a natural consequence of the public character of their duties, that the State should afford them that direction in the discharge of them which administrative servants may reasonably expect. Provision was made for this by the Charitable Trusts Act of 1853, which requires the Commissioners to receive and consider all applications which may be made to them by Charity Trustees, "for their opinion, advice, or direction respecting such charity, or the management or administration thereof, or the estate, funds, property, or income thereof, or the application thereof, or any question or dispute relating to the same respectively."† Any advice they may give will relieve any person who acts under it from all responsibility, unless he obtained the advice by a misrepresentation. A similar power was conferred in 1867 upon the Irish Board.‡ Again, the peculiarly delicate, and yet often advantageous task, of avoiding litigation by effecting a compromise, is one which trustees cannot undertake on their own judgment, and as they are discharging a public duty the State may fairly share the responsibility. Thus the Charity Commissioners have power to sanction the compromise or adjustment of any claim made either against or on behalf of a Charity, so as to effect a final bar to all litigation.§ In actual litigation, again, whether with their *cestuis que trust* or with the outside world, peculiar facilities of procedure may be given to the Trustees; as where by the Charitable Trusts Act,

* *Supra* p. 114, 32 and 33 Vic. c. 110, ss. 12 and 13. See 23 and 24 Vic. c. 136, s. 16. For Ireland, see 30 & 31 Vic., c. 54, s. 16.

† 16 and 17 Vic. c. 137, s. 16.

‡ 30 and 31 Vic. c. 54, s. 2; 34 and 35 Vic. c. 102, s. 5.

§ 16 and 17 Vic. c. 137, s. 23; 18 and 19 Vic. c. 124, s. 31. See a similar power for Ireland, 30 and 31 Vic. c. 54, s. 3.

1860,* a summary remedy at Petty Sessions was provided for obtaining possession of charity premises from any ex-officer or ex-almsman of the charity who might wrongfully hold over. Conversely, the State may give Charity Trustees peculiar facilities for escaping hostile litigation, by giving some public officer or Board a veto upon all Charity suits. We have already seen how beneficial such a veto has been found in this country.† The Irish Commissioners received, in 1867,‡ a somewhat similar power, which they find to be of great value; for legal proceedings, they say, "are often taken, and heavy costs incurred, which are either unnecessary, or in which the objects sought could have been accomplished without expense to the Charity."§

* 23 and 24 Vic. c. 136. s. 13.

† *Supra*, p. 153.

‡ 30 & 31 Vic., c. 54, s 4.

§ Report for 1879.

PART VII.

THE REFORMS STILL NEEDED IN ENGLAND.

We learned at the outset of our inquiry that it is still an open question among competent writers whether the law should not entirely prohibit charitable Foundations. After this it may seem somewhat surprising that we should have ended by discussing the question whether the law should treat them with any peculiar favour. That it should be necessary to investigate both these points, is a striking proof of the extreme diversity of opinion which still prevails on the subject of Endowments. A remarkable illustration of the diversity was afforded even in so homogeneous a body as the Law Amendment Society, when it came to discuss the law of Mortmain. A proposal, Mr. Hare tells us,* to abolish George II.'s restrictions upon gifts of land, was rejected by nearly half of those who took part in the discussion, because it would encourage charitable Foundations; and a proposal to revise them every thirty years was rejected by about an equal number, because they thought it would have the contrary effect, and would discourage them. It has been the endeavour of this Essay to clear the confusion of thought from which this diversity of opinion arises, and to show what portion of truth lies at the bottom of either view. The results we have arrived at can be very briefly summed up.

Foundations in themselves are usually good, but when left to themselves they usually become bad. A course nevertheless is possible by which the badness may be minimised and the goodness maintained. There must be constant Supervision, periodical Revision. The one will restrain the Principle of Caducity, the other will counteract the Principle

* Mr. Hare's dissertations on Charities, the most judicial expositions that have yet been given of the results of modern experience on this subject, may be found in the Transactions of the Social Science Association for 1859 and 1866, and the *Fortnightly Review* for 1870.

of Obsolescence. Moreover, though Foundations at their outset are usually good, they are by no means good invariably. A considerable minority of them either spring from a bad origin or tend to a bad result. Lest this minority should be increased, the law must impose certain Restrictions on the establishment of new Foundations.

In these conclusions we have obtained, in general terms, a solution of our general problem; we have determined the principles which should guide the legislator in dealing with charitable endowments. But there is also a narrower and more concrete question which may well demand our attention. It is of some practical importance that we should now inquire how far the law of our own country at the present time is in harmony with these principles. Do any reforms still remain to be accomplished in our English jurisprudence of Mortmain? Does it adequately provide for the three great objects of Supervision, Restriction, and Revision?

(I.) For the central Supervision of charities, we possess, in the Board of Charity Commissioners, an organisation which was framed with great skill and has done its work with extraordinary success. But for perfect efficiency it still needs, as we have seen,* some more summary power of obtaining the balance-sheets of indolent or recalcitrant Trustees, and of dealing with any mismanagement that those sheets may disclose. Moreover the Commissioners have no machinery by which they can test the educational results produced by the schools, whose finances fall under their control. Parliament has still to carry out the proposal made by the Schools Inquiry Commissioners, that a permanent staff of Government Inspectors should be provided for our 2,964 endowed schools, like that which has raised our primary schools to their present efficiency. If the State has an interest which justifies it in supervising the revenues of these Foundations, it has an equal interest

* *Supra*, p. 142. "The accounts of school endowments," the Irish Endowed School Commissioners reported, "are in general ill-kept, because they are imperfectly audited. The books of the Governors of Erasmus Smith's schools were not balanced for a period of eleven years." (Parl. Papers, 1857-8, xxii. 264.)

in supervising the results which those revenues are spent in purchasing. Lastly, it is desirable that the powers which were conferred upon the Charity Commissioners by the Act of 1860,* of making cy-pres schemes for obsolete Charities, and of removing or appointing Trustees, should be made general. At present, if the income of the Charity exceeds £50, the Commissioners can only exercise these powers upon the application of a majority of the Trustees. In other words, these powers are of no avail for any important Charity, unless a majority of the persons most interested in preventing their exercise concur in inviting it.

But in the local Supervision of charities by the governing bodies themselves, the reforms that remain to be accomplished are of much greater extent. We have already dwelt† upon the necessity of rendering compulsory and general the provisions—at present only optional and therefore only partially adopted—by which all appointments of the local administrators of charities may be effected under the control of the Charity Commission, and by which "that fruitful source of lawyers' bills, the legal estate," in charity property may be vested in Official Trustees. But beyond this there remains, as we have also seen, ‡ the far more important reform of consolidating the various bodies of local administrators in each district, so as to produce in every county or large borough a Provincial Board of Charities. By such consolidations, the duties of a Charity Trustee will be rendered less irksome, at the same time that his position will become more dignified. There are few higher features—there can be no higher political feature—in our national character than the readiness with which unpaid public work is undertaken by Englishmen of all ranks.§ The man—and there is no parish in England

* *Supra*, p. 151. † *Supra*, p. 158. ‡ *Supra*, p. 154.

§ Lord Brougham eloquently says :—"In the history of this country, public or domestic, I know of no feature more touching than the affecting sight of those who every day before our eyes are seen devoting their fortunes, their time, their labour, their health, to offices of benevolence and mercy. How many persons do I myself know, to whom it is only necessary to say, 'There are men without employment, children uneducated, sufferers in prison, victims

where such a man may not be found—who, without hope of reward or profit, cheerfully takes hour after hour from his business or his pleasure that he may devote them to the management of some public Charity, exhibits a higher degree of unselfishness, and confers upon his country a more unmixed benefit, than did the Founder who gave that Charity its endowment. Any new organisation which produces a greater degree of union in the administration of the various Charities of a district, will serve at once to remove much superfluous drudgery from the shoulders of such men, and to reward their public spirit by a position of greater honour.

Lord Salisbury has distinguished Christian philosophy from philosophical philanthropy, by the remark that the Christian usually gives away his own money, whilst the philosopher usually tries to give away the money of some one else. Be this as it may, a philanthropist who is willing to be guided by both philosophy and Christianity at once, must often find his highest duty, not in the giving away of

of disease, wretches pining in want,' and straightway they will abandon all other pursuits, as if they themselves had not large families to provide for, and will toil for days and for nights, stolen from their own most necessary avocations, to feed the hungry, clothe the naked, and shed upon the children of the poor that inestimable blessing of education, which alone gave themselves the wish and the power to relieve their fellow-men. I survey this picture with inexpressible pleasure, and the rather because it is a glory peculiar to England. She has the more cause to be proud of it, that it is the legitimate fruit of her free constitution. Where tyrants bear sway, palaces may arise to lodge the poor, and hospitals may be the most magnificent ornaments of the seat of power. But though fair to the eye, and useful to some classes, their foundations are laid in the sufferings of others. They are supported, not by private beneficence, which renders a pleasure to the giver as well as a comfort to him who receives, but by the hard won earnings of the poor, wrung from their wants, and frequently by the preposterous imposts levied upon their vices. While the rulers of any people withhold from them the enjoyment of their most sacred rights, a voice in the management of their own affairs, they must continue strangers to that honest elevation of purpose which distinguishes freemen, teaches them to look beyond the sphere of personal interest, makes their hearts beat high, and stretches out their arms for the glory and the advantage of their country. There is no more degrading effect of despotism than that it blunts the charitable feelings of our nature, rendering men suspicious and selfish, and forgetful that they have a country. Happily for England, she has still a people capable of higher things." (Parl. Debates, xxxviii., 610.)

money at all, but in the task of protecting from abuse the money which has long before been given by others.

(II.) So far as Restrictions upon the creation of charitable endowments are concerned, the English law seems to err both by excess and by defect. It is too lax as to the objects for which, too stringent as to the kind of wealth with which, Foundations are endowed. There are, as we have seen,* many species of Charities which economic science has long condemned, but which the law still permits to be created. Surely the time has come when the creation of permanent endowments for doles, for marriage-portions, for poor relations, for apprentices' premiums, for almshouses, for primary schools, should no longer be allowed, except where peculiar local circumstances may justify the Charity Commissioners in conceding special permission for such a gift. But on the other hand we have found† that English law places unnecessary restrictions on the gift of real property to Charities. Some provision, like that made by the Act of Geo. II., for the registration of such gifts is undoubtedly prudent; and it is desirable that registration should be rendered equally compulsory in the case of gifts of personalty.‡ But the remaining provisions of the Act—which render it illegal to give lands to a Charity during the last year of the donor's life, or by his will—appear, as we have seen, to serve no purpose of appreciable value, whilst they frequently prevent the creation of very useful endowments, and still more frequently cause money to be wasted in costly litigation.§

(III.) But the want of adequate means for the Revision of endowments is probably the most injurious defect in our present jurisprudence of Mortmain. The great wealth and the great public spirit of our people, coupled with the peculiar laxity of our law, has enriched England with so long a series of Foundations, that the practical results produced by all the earlier, and by many of the later, ones have become widely changed by the change of surrounding cir-

* *Supra*, pp. 40-56.

† *Supra*, p. 59.

‡ *Supra*, p. 131.

§ *Supra*, pp. 67-75.

cumstances. The details, and in many cases the main objects, of the Foundation have become obsolete. We have already seen* how inadequate a provision our existing law has made for readjusting such endowments to the new wants of new times.

A Tribunal of Revision is required which, whilst allowing every wise Founder an adequate Term of Inviolability for the undisturbed trial of the experiment he has planned, shall have power to save his gift from being wasted, and to correct his errors, as soon as the results of the trial demonstrate that his experiment has failed. The institution of such a Tribunal is the chief duty that will devolve upon the statesman who undertakes the noble task of completing the work of Brougham and Cranworth, and giving a perfect form to the English law of Charities.

* *Supra*, p. 210.

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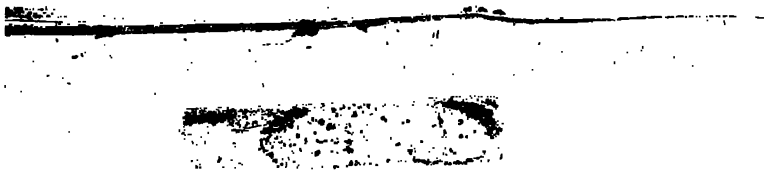
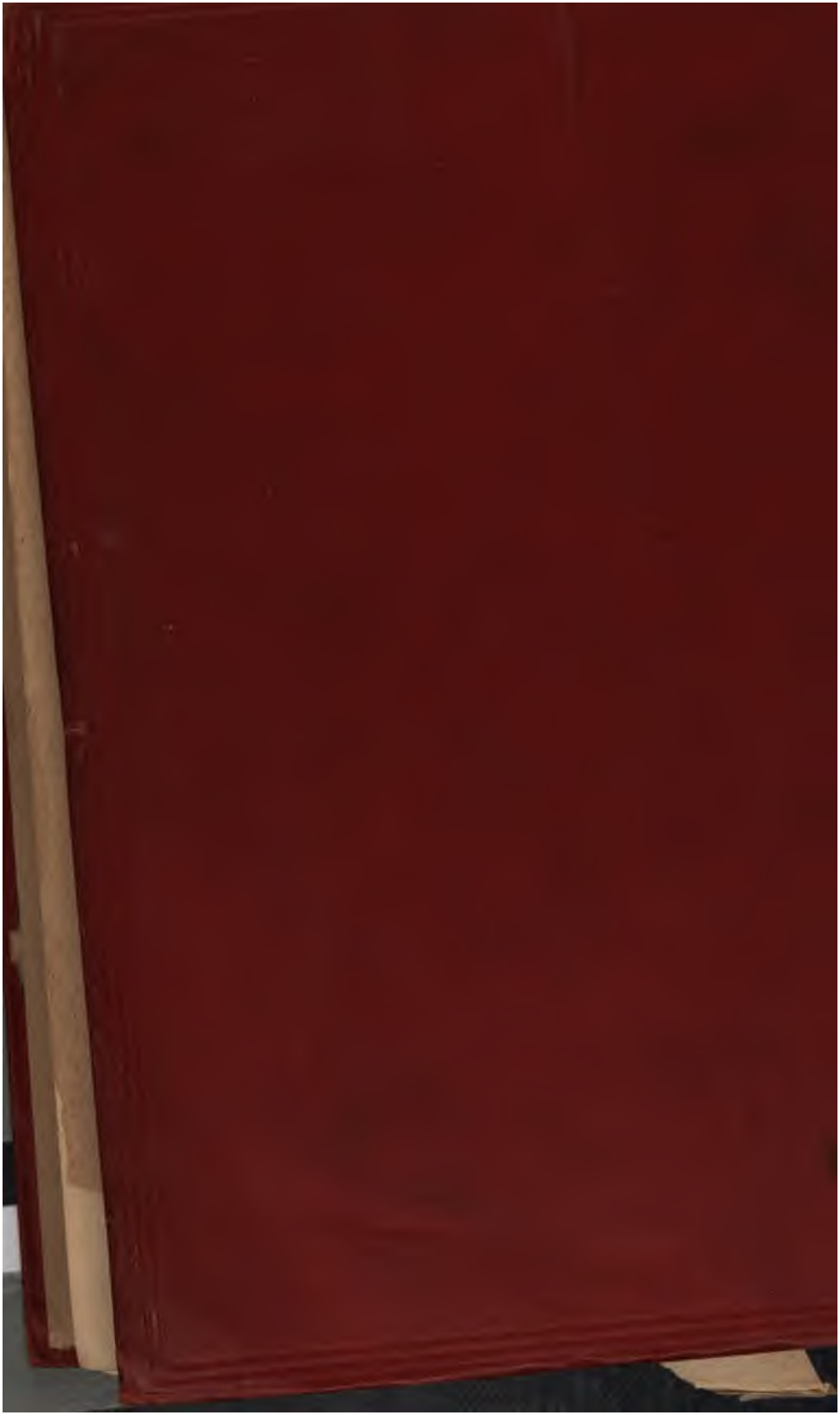
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